Supreme Court, U.S.
FILED
AUG 4 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-167

ST. PAUL AT CHASE CORPORATION,
A MARYLAND CORPORATION,
Petitioner,

v.

MANUFACTURERS LIFE INSURANCE COMPANY OF TORONTO, A CANADIAN CORPORATION,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

W. HAMILTON WHITEFORD,
Sun Life Building,
Baltimore, Maryland 21201,
Counsel for Petitioner.

Of Counsel

DAVID FREISHTAT
Tower Building,
Baltimore, Maryland.

The Daily Record Co., Baltimore, Md. 21203

Contents of Appendix

	PAGE
Opinion and Judgment below filed May 17, 1971	1a
Motion for Rehearing filed May 25, 1971	58a
Supplemental Motion for Rehearing filed June 14, 1971	67a
Motion to Stay of Mandate filed June 14, 1971	81a
Orders of Court Below on above Motions	86a

In The
Court of Appeals of Maryland

No. 400
September Term, 1970

St. Paul at Chase Corporation, et al.

v.

The Manufacturers Life Insurance Company et al.

Hammond, C.J., Barnes, McWilliams, Finan, Singley, Smith, and Digges, JJ.

Opinion by Smith, J.

Filed May 17, 1971

The trial judge in this case (Proctor, J.) prefaced his findings of fact (the delivery of which consumed a full court day and which took up over 50 pages of the record extract) with the comment:

> "In the past, I have looked upon St. Paul as a great Christian apostle. However, from here on I'm very much afraid that to me it will mean a high-rise apartment building at the corner of St. Paul at Chase."

The apartment house was the dream of appellant Charles W. Williams. As his literature put it, he conceived of it as a "prestige address" intended for "Gracious In-Town Living." Appellant St. Paul at Chase Corporation was formed for the purpose of erecting and operating the building. This litigation was produced when Manufacturers Life Insurance Co. of Toronto, Canada, cancelled a commitment

it had made for permanent financing of the apartment building.

The situation here can perhaps best be understood by reference to the cast of characters:

St. Paul at Chase Corporation (St. Paul) — plaintiff below, and appellant and cross-appellee here; received judgment of $1,935,955.60 at trial below; this is the company which was developing the apartment project in question.

Charles W. Williams (Williams) — president and principal stockholder of St. Paul.

W. Hamilton Whiteford (Whiteford) and Edward A. Johnston (Johnston) — attorneys for St. Paul.

The Manufacturers Life Insurance Company (Manufacturers) — defendant below, and appellee and cross-appellant here; Canadian Insurance Company which was to provide a $4,800,000 permanent mortgage to St. Paul.

Thomas R. Lamon (Lamon) — mortgage superintendent for Manufactures.

Donald W. Lambert (Lambert) — assistant mortgage superintendent for the United States for Manufactures.

Weaver Brothers, Inc. (Weaver Bros. or Weaver) — defendant below and appellee and cross-appellant here; retained by St. Paul to procure financing for the project.

Sidney H. Tinley, Jr. (Tinley) — senior vice-president of Weaver Bros.

E. Catherine Byrne Doehler (Miss Byrne) — another vice-president.

The Mullan Contracting Company (Mullan Contracting) — general contractor for the project.

Charles A. Mullen (Mullan) — president of Mullan Contracting.

Chemical Bank New York Trust Company (Chemical) — New York bank which eventually made $4,800,000 construction loan (not the permanent mortgage) for the project; not a party to this suit, but party to federal suit now pending and awaiting outcome of this suit.

Merchants Mortgage Company (Merchants) — another mortgage broker, which eventually procured the construction loan from Chemical.

Ralph Lubow (Lubow) — loan officer of Merchants.

Daniel A. Neumayer (Neumayer) — architect for the project.

Corbin C. Cogswell (Cogswell) of The Cogswell Construction Company — inspector for Weaver Bros. and Manufacturers.

Merritt & Harris — inspector for Chemical.

Williams and St. Paul sued Manufacturers and Weaver Bros. As Williams put it in his brief:

> "Upon Defendants' Motion to Dismiss, Williams' individual claims against Manufacturers and Weaver were dismissed. However, as Williams is personally liable to Chemical for Chemical's Deficiency Decree, until this entire matter is resolved, Williams is an interested party and as such is a Party Plaintiff, see *Newark Trust Co. v. Talbot Bank*, 217 Md. 141 (1958)."

The exact breakdown of the judgments against Weaver Bros. and Manufacturers will be set forth later. St. Paul believes these judgments to be inadequate while Weaver Bros. and Manufacturers are convinced they had no liability. Therefore, they have all appealed. We shall affirm as to liability, eliminate punitive damages, and remand the case for entry of judgments which increase somewhat — but not to the extent desired by St. Paul — the compensatory damages.

Mullan Contracting and Real Estate Management Co., Inc., are use plaintiffs in the litigation and appear here as

cross-appellees, being owed in excess of $300,000 by St. Paul.

The six counts in the declaration were summarized by the trial judge as follows:

"Count 1 of the Declaration

"Although it is long and verbose, the gravamen of this count is that Weaver breached its contract of December 6, 1963, with the Plaintiff. * * * [(Probably the gist of this count is contained in paragraphs 40 and 41 of the declaration which stated:

> "40. The Plaintiffs allege that having accepted the above modifications of Weaver's offer, they then waited for more than a reasonable time for Defendant Weaver to provide them with a construction loan, as Defendant Weaver had promised to do. The Plaintiffs allege that it was only after Defendant Weaver had attempted to secure their property for another client and only after Tinley, as Executive Vice-President of Defendant Weaver, had advised Plaintiffs' counsel, that Defendant Weaver had spent entirely too much time, that the Plaintiffs with their entire project then in jeopardy, advised Defendant Weaver on December 6, 1963, that the Plaintiffs were placing their construction loan elsewhere. The Plaintiffs allege that with their entire project then in jeopardy, under the time limitation set by Defendant Manufacturers in their Letter of Commitment of June 7, 1963, the Plaintiffs were required to do all in their power and regardless of the expense involved to obtain a construction loan from another source in an attempt to avoid the heavy losses and damages with which they were faced.
>
> "41. The Plaintiffs allege that in spite of the modifications to Defendant Weaver's original offer and contract agreed to by Plaintiffs in an effort to assist Defendant Weaver, Defendant Weaver did not secure a construction loan for the Plaintiffs

by September 1, 1963, as they had promised and bargained to do, did not secure a construction loan for the Plaintiffs within a reasonable time thereafter, and in fact never did secure a construction loan for the Plaintiffs. The Plaintiffs allege that the failure of Defendant Weaver to secure a construction loan for the Plaintiffs as they had promised and bargained to do delayed the start and hence the completion of the Plaintiffs project by many months. The Plaintiffs allege that this failure on the part of Weaver to furnish the Plaintiffs a construction loan by September 1, 1963, and thereafter within a reasonable time, contributed to and set in motion those causes which caused the Plaintiffs their heavy losses and damage including the loss of their entire project."

It thus will be seen that the declaration itself did not refer to the December 6 agreement. This agreement supplanted the earlier agreement.)]

* * *

"Count 2 of the Declaration

"This count sounds in tort and is based upon two alleged tortious actions by Weaver.

"First, Plaintiff contends that Weaver failed to process the Plans and Specifications promptly, and thus committed a tort. I have already found for Defendant Weaver on this point.

"Second, Plaintiff alleges negligent and deceitful conduct on the part of Weaver in failing to button up Manufacturers' offer of a construction mortgage loan, including Tinley's advice to Williams, when he accepted such offer, that it had been withdrawn. * * *

* * *

"Count 3 of the Declaration

"In this count Plaintiff contends that Manufacturers is responsible to it for breach of contract — Manufac-

turers' offer of June 7, 1963, and Plaintiff's acceptance of June 21, 1963. * * *

* * *.

"Count 4 of the Declaration

"This is an action against Manufacturers in tort. It is based upon three contentions: (1) Alleged failure of Manufacturers to exercise good faith and alleged negligence in the processing and approval of plans and specifications. I have already rendered a verdict in favor of Manufacturers on this count. (2) Its alleged failure to exercise good faith in breaching the contract. (3) Alleged constructive fraud on its part in breaching the contract.

* * *

"Count 5 of the Declaration

"This is a contract action against Weaver to recover the $48,000 paid by Plaintiff to Weaver on May 11, 1964, as a finder's fee for obtaining the permanent mortgage loan commitment from Manufacturers.

* * *

"Count 6 of the Declaration

"This is a tort action against Weaver and Manufacturers. It merely combines the allegations of Counts 2 an 4, and alleges that Defendants were joint tortfeasors. * * *"

St. Paul and Williams have summarized the request for damages and the actual award by the court as follows:

"St. Paul requested the following in damages:

A. Direct Damages — loss of property		$7,920,000
B. Special Damages — loss of business		
Value of Business	$7,265,000	
Less Amount of Mortgage	4,800,000	2,465,000

C. Consequential Damages—		
1. Chemical Bank — Deficiency Decree — 2/27/67	1,297,952	
2. Extension fee paid Manufacturers on 9/7/65	24,000	
3. Fee paid Weaver 9/18/63 on their loan of $480,000	9,600	
4. Interest on Weaver's loan of $480,000 from 9/18/63 to 1/1/65; paid 5/1/64	18,160	
5. Merchants Mortgage Co. fees and legal expenses	85,500	
6. Dr. G. C. Merrill contract covering moving, interruption and dislocation of business, due over a 4 year period commencing with 4/1/66	50,000	1,485,212
		11,870,212
D. Interest from 5/15/66 to 2/15/70		2,716,300
Total Compensatory Damages		$14,586,512

"Under Count V, St. Paul claimed the return of the fee it paid to Weaver.

"The Court Awarded:

	Compensatory	*Punitive*
Count I (Plaintiffs v. Weaver — Contract)	5.00	50,000
Count II (Plaintiffs v. Weaver — Tort)	185,167.40	100,000
Count III (Plaintiffs v. Mfgrs. — Contract)	1,552,783.20	–0–
Count IV (Plaintiffs v. Mfgrs. — Tort)	–0–	–0–
Count V (Plaintiffs v. Weaver — Contract)	48,000.00	–0–
Count VI (Plaintiffs v. Mfgrs. & Weaver jointly	–0–	–0–
	$1,785,955.60	$ 150,000

"No prejudgment interest was awarded except on the Chemical Deficiency Decree. The $1,552,783.20 above was awarded to cover the deficiency decree and included interest at 6%."

On appeal Williams and St. Paul raise four issues. The first three all deal with their dissatisfaction with the damages awarded. The fourth alleges error on the part of the trial court in denying a motion to amend by interlineation the damage clause of the declaration so as to materially increase the claim for compensatory damages to approximately $14,000,000.00. We shall not be obliged to pass upon that point since the damages awarded are less than those claimed in the original declaration. They do not appeal the issue of the refusal of the trial court to enter judgment against Manufacturers under the fourth count of the declaration which was in tort, nor do they claim error on the part of the trial judge in not allowing punitive damages against Manufacturers.

Weaver Bros. alleged error in finding it liable at all, in entering judgment for punitive damages against it and in

the amount of the judgment for compensatory damages. Manufacturers contests the judgment as to liability and the amount of damages awarded.

We shall summarize as briefly as possible the essential facts, adding some additional summation of facts under the points discussed.

Weaver Bros. is a mortgage broker. In *Hill v. Benevicz*, 224 Md. 79, 167 A. 2d 104 (1961), Chief Judge Brune discussed the practice of mortgage brokers and mortgage correspondents, stating:

> "Rouse's usual practice appears to be to submit applications to the F.H.A. for mortgage insurance in its own name, but to place the mortgage, when a commitment for insurance has been obtained, with one or another of the lending institutions for which its acts as mortgage correspondent, and which are themselves F.H.A. approved mortgagees. Rouse then takes the mortgage in its own name, assigns it to the lending institution and services the mortgage under a contract between Rouse and the lender, pursuant to which Rouse receives compensation. Rouse thus performs several functions in the transaction. It acts partly in its own interest, partly as agent for the lending institution and partly for the benefit of the prospective mortgagor and partly also for the benefit of the would-be seller, for without the mortgage financing the sale probably would not produce the cash consideration which he is seeking. All of these functions are well known in the business, and there is no question of an agent secretly serving his own interest or the interest of one principal to the detriment of another." *Id.* at 84.

A chronology of major events is as follows:

August, 1962: Williams contracted the first of nine purchase options on land on the northeast corner of St. Paul and Chase Streets in Baltimore; total purchase price was to be $725,000; the options were

to be exercised by June 15, 1963, with payment apparently to be made by September 1, 1963.

December, 1962: St. Paul was incorporated by Whiteford, with Williams as the sole stockholder.

March, 1963: Tinley heard that Williams was contemplating erection of a high-rise apartment and directed one of his subordinates to contact Williams which was done.

March 25, 1963: Williams contacted Tinley about a possible $5,200,000-$5,400,000 mortgage for the project.

April 10, 1963: Whiteford told Tinley that Williams needed 100% financing because he had no working capital.

May 14, 1963: Tinley advised Williams and Whiteford that Manufacturers was interested in a $4,800,000 permanent mortgage for 25-26 years at 6¼%. Weaver Bros. was to receive $48,000 for securing the permanent mortgage and another $48,000 for securing a $4,800,000 construction loan. St. Paul was also to pay Manufacturers a refundable "standby fee" of $48,000. Tinley said that Weaver Bros. would give a $200,000 second mortgage if Manufacturers' $4,800,000 mortgage was not enough. Williams wanted to act as his own general contractor on the project (without bond), with bonded sub-contractors.

May 29, 1963: Weaver Bros. made a written submission concerning the project to Manufacturers. The application was accompanied by Weaver's evaluation of the property in the amount of $7,920,000 for land and building and $7,265,000 on the basis of capitalization at 7½% of the estimated net income of $544,865 per year. These figures, as will later be seen, contribute materially to this controversy.

June 5, 1963: Financing and plans for the project were approved by Manufacturers.

June 7, 1963: Commitment letter written by Manufacturers — it was for breach of this contract that the company was held liable at the trial below. In addition to interest on the loan, Manufacturers was to receive 13.31% of all gross rental income in excess of $721,044 (80% of the forecasted gross income). The offer was to be accepted by June 24, 1963.

June 14, 1963: Manufacturers' letter of commitment was discussed at a meeting, at which Tinley gave assurances that he would be able to secure the necessary construction loan by September 1, 1963. He also stated that the requirement of "satisfactory completion" of the building did not mean that the building had to be completed in every detail. Tinley made an offer of a $200,000 second mortgage for working capital purposes; the land options on the nine lots were exercised.

June 21, 1963: St. Paul accepted Manufacturers' offer and paid the $48,000 standby fee.

Late July or early August, 1963: Tinley telephoned Whiteford and told him Williams' poor credit standing (because of business losses in Virginia) and his insistence upon acting as his own general contractor without bond were making it difficult to obtain a construction loan.

Early August, 1963: Tinley asked Lamon of Manufacturers if that company would be interested in financing the construction loan.

August 10, 1963: Williams met with Merchants, which offered a $4,800,000 construction loan of 6% if they could have 2-3 weeks for approval of the plans. Williams "tabled" this offer because he needed the money prior to September 1, 1963, and did not think that he could afford this time.

August 12, 1963: On or about this date, Lamon telephoned Tinley. He said that Manufacturers would make a construction loan commitment as follows:

interest at 6%; a separate $24,000 fee; approval by Manufacturers of the final plans and specifications; and a bonded general contractor. Tinley passed this information on to Williams, who indicated he was upset because it ruled him out as his own general contractor, since he could not get a bond.

Late August, 1963: Tinley called Whiteford in Ocean City and told him that Weaver Bros. would procure a land mortgage loan for St. Paul in the amount of $480,000 so that the company could preserve its land options while ironing out the construction loan problems.

August 30, 1963: Letter from Weaver Bros. to St. Paul was delivered stating that Weaver Bros. was loaning $480,000 to St. Paul on land mortgage, that a $4,800,000 construction loan had been arranged, and that a $4,800,000 permanent mortgage had been arranged. (There was some indication that this letter was written solely for the benefit of the holders of the nine lots in order to get them to grant an extension on the date of payment.)

Johnston (Whiteford's partner) took this letter around, and obtained extensions from the landowners until September 18, 1963.

Williams delivered a set of plans for the project to Weaver Bros. Weaver Bros. apparently considered them to be only preliminary plans; Mullan testified that they were permanent plans and that they had been used to secure the necessary building permits from Baltimore City.

September 5, 1963: Williams had previously asked Mullan Contracting to become the general contractor. At a meeting on this date, there was some discussion relative to Mullan Contracting's obtaining the construction loan from Maryland National Bank. Tinley again said that Weaver Bros. would advance $200,000 on a second mortgage basis for working capital.

At another meeting on this same date (or maybe at the same meeting mentioned above), Tinley allegedly said that Weaver Bros. would take a $500,000 second mortgage to assure completion of the building, if necessary.

September 18, 1963: Weaver Bros. made the $480,000 land loan to St. Paul.

October 10, 1963: Mullan said that his application at Maryland National for $4,800,000 had been approved, subject to a $500,000 second mortgage from Weaver Bros. to be used for land fees and costs. Tinley denied that he had made an offer of a second mortgage, and an argument ensued. Williams said he would accept Manufacturers' offer for a construction loan and asked Tinley to place it. Tinley said Manufacturers' offer for the construction loan had been withdrawn. The trial court found that the offer had never been withdrawn and was still good as of this date, and that Williams' statement to Tinley acted as an acceptance of Manufacturers' offer.

Shortly thereafter a meeting took place at which Tinley suggested that Williams sell his interest in St. Paul to make it easier to get the construction loan; Williams refused.

November 25, 1963: Meeting where Tinley suggested sale to Messrs. Gottschalk and Grant. Williams left in a huff.

November 26, 1963: Tinley said he could still place the construction loan and asked for two more weeks; Williams gave him until December 6, 1963. On the same date, Williams called Lubow of Merchants and resubmitted his original proposal.

December 6, 1963: The original agreement between St. Paul and Weaver Bros. was "finally terminated." They entered into a new contract. As the trial judge put it:

"Tinley described Weaver's obligations under this new Agreement as being, first, to make sure that the Buy-Sell Agreement between the construction and permanent mortgage lenders was signed by all of the parties at the construction mortgage loan settlement; and, second, if any problems arose, to assist in ironing them out. Under this new contract Plaintiff was obligated to pay Weaver $96,000 for its services — $48,000 in cash and $48,000 at a later date. Weaver agreed that it would not assert any claim against the fee of Merchants * * * for placing the construction mortgage loan."

The trial judge found as a fact that Manufacturers' offer to make a construction loan was still open at this time.

December 6, 1963: St. Paul and Merchants entered into a contract under which the latter was to be paid $72,000 for obtaining a construction mortgage loan commitment for the project. A fee of $10,000 was to be paid to certain persons who had introduced Williams to Merchants.

December 27, 1963: Commitment issued by Chemical.

March 9, 1964: Plans and specifications for the project were finally approved by Weaver Bros. on behalf of Manufacturers.

April 8, 1964: Plans and specifications were finally approved by Manufacturers.

April 27, 1964: St. Paul executed a contract with Mullan Contracting, the use plaintiff, for construction of the building.

May 1, 1964: Closing of Chemical's construction mortgage loan was held in New York, at which all of the necessary documents were executed, including a promissory note in the amount of $4,800,000 and the "Buy-Sell" agreement between Manufacturers and Chemical.

August 19, 1965: The expiry date under Manufacturers' permanent mortgage loan commitment was extended from September 7, 1965, to March 7, 1966, by letter from Manufacturers to Weaver Bros. Plaintiff paid Manufacturers $24,000 for such extension.

March 4, 1966: At a meeting of its executive committee Manufacturers decided not to extend the commitment any further. Lamon was instructed to advise Chemical.

March 8, 1966: Manufacturers wrote Weaver Bros. cancelling the commitment.

April 13, 1966: Chemical filed foreclosure action.

June 1, 1966: Foreclosure sale. There was only one bidder at the sale, and the property was knocked down to a representative of Chemical.

February 23, 1967: Decree in personam was entered in the foreclosure proceedings against St. Paul in the amount of $1,297,952.39.

The commitment of Manufacturers provided in pertinent part:

"It is understood that our funds will not be required until we receive a report from your inspector certifying that construction of the building has been satisfactorily completed, and the certificate of an architect, approved by our Company, certifying that construction has been completed in accordance with the plans and specifications which are to be submitted to us for approval. Engineering and architectural approval of the project is also required."

A "Buy-Sell" agreement was entered into between Chemical and Manufacturers. This appears to be the conventional practice in financing of this type. One paragraph of that agreement, which was in the form of a letter from Chemical to Manufacturers, stated:

"1. At any time on or before September 7, 1965 (or the last day to which the commitment may be

extended, if any extension thereof has been made as provided herein), if the conditions of the Commitment have been fulfilled, you agree to purchase and we agree to sell the Note for $4,800,000."

Manufacturers accepted the agreement, Weaver assented to it, and St. Paul appended its consent to the agreement and agreed that it would "(i) take or cause to be taken any action required of the Borrower in order to comply with the terms, covenants and conditions of this Agreement and the Commitment, (ii) accept a loan from [Chemical] under the Commitment and (iii) not accept from any other person or persons a loan secured by a deed of trust creating a first lien so long as the Commitment ha[d] not expired."

The trial judge said in his findings of fact relative to the June 14 meeting to discuss the Manufacturers' commitment:

> "Williams' testimony as to this meeting was that Tinley said that satisfactory completion meant the work had to be done in a workmanlike manner, and in accordance with the plans and specifications. Williams further testified that the degree of completion was discussed, and that Tinley said that an inspector would check the work monthly. Williams further testified that Whiteford had said that a construction loan had to be part of the package, and Tinley said we could rely on Weaver having a construction mortgage by September 1, 1963; that Whiteford said that the money had to be available by September 1, 1963. * * * The reason for the finding is that it is clear from the testimony of all the parties that at that point, Tinley was enthused about the project and its prospects, had obtained a permanent loan commitment from Manufacturers, and sincerely believed that with the permanent loan commitment on hand, he would have no difficulty in obtaining a construction mortgage loan commitment. Williams further testified that he asked if the word completed meant that everything had to be finished and Tinley replied that the building didn't

have to be completed in every detail. I find that was the substance of what Tinley said, primarily because that's the substance of the testimony Tinley gave here in Court. Tinley stated that Manufacturers' proposal had to be accepted and the standby fee paid by June 24, otherwise the offer was void. Finally, Whiteford asked Tinley if there was any question about the items discussed at the meeting, saying that this was a serious step, and Tinley said no. Again, I am confident that that's the gist of what took place, and so find.

* * *

"In his version of what transpired at this meeting, Tinley said that everyone was delighted with the information that the permanent loan commitment had been obtained, that Williams was interested to know whether there would be an architect coming from Canada, and that he advised Williams, from his own experience, that the answer was no; that, however, inspection by an architect would be necessary, unless an inspector was appointed to make monthly inspections. Tinley said that Williams inquired what the term satisfactory completion meant, and he replied that the building had to be finished, that every apartment had to be ready for occupancy; that Williams further inquired about the term — satisfactory completion — and he said it was not absolutely necessary that the building be 100 per cent completed; that if some completely minor items remained to be done, roll over would take place. Tinley further testified there was a discussion about the last paragraph of the commitment letter, and that he said it meant what it said. He further testified that Williams inquired whether everyone always met the date set forth in the commitment letter, and he said it had been his experience, that if an owner-builder got to the point where an additional thirty days was necessary for completion, he would ask for an extension and normally get it. Tinley further testified that there was a discussion about whose responsibility it was to get the

certificates referred to in the third paragraph of the commitment letter, and that he told Williams that the burden would be upon him. I find that that statement was made. It would be a logical statement for Mr. Tinley to make in response to that inquiry.

"Asked about the engineering and architectural approval referred to in the third paragraph of the commitment letter, Tinley testified that he said it would have to be received before roll over; that whoever gave such approval was to send it to Manufacturers, who had the right of final approval.

"Tinley admitted that, at that meeting, he made an offer of a $200,000 second mortgage for working capital purposes; that this is what Williams wanted. Tinley, on cross examination, testified that he did not remember Whiteford saying St. Paul couldn't make an application for a permanent loan without assurance of a construction loan; that, however, Whiteford impressed on everyone it was very important to get a construction loan to pick up the land and go ahead with the project. Tinley stated that he told those in attendance that he would undertake to get a construction loan on a best efforts basis; that Whiteford gave Weaver authority to go ahead with the permanent loan application, without Weaver's assurance of a construction mortgage. However, as I have already stated, I find that there was assurance of a construction loan commitment."

The two top floors of the building, 22nd and 23rd, were damaged in 1966. On this subject the trial judge said in his finding of fact:

"Next comes the question of the storm and the alleged resulting damage. The weather reports, in my judgment, are inconclusive. I have examined them. There was a bad blizzard. There was a time after the blizzard, a week or ten days later, where the daytime temperature did rise to a point where there would have been a thaw. The difficulty with proof of this phase of the case as far as Plaintiff is concerned is

that the time when the leak developed is not pinpointed. No witness testified that the leak was discovered on February 13 or 14, the day when quite a bit of thaw took place. Neumayer testified, however, that the terraces had been tested for leaks. That tends to negate the idea of the damage being attributable to the storm. So that I find that Plaintiff has not met — for whatever significance it has in the case — its burden of proving that the damage to the 22nd and 23rd floor suites was due to 'an act of God'."

This damage was a factor in the question of whether the building had been completed at the time of the March 7 deadline.

At one point there was sincere belief on the part of Williams that Mullan would not be able at the pace at which he was going to complete the building by March 7.

On the question of completion of the building the trial judge said:

"Finally, I find as a fact that the high-rise apartment building at the northeast corner of St. Paul and Chase, as of March 7, 1966 was substantially complete. The reasons for that finding are manifold. Mullan says it was substantially complete; Cogswell said it was substantially complete and Cogswell was Manufacturers' and Weaver's representative; Neumayer says it was substantially complete; the photographs taken by Tadder are only of the top two floors. You can bet your bottom dollar if there was substantial evidence of incompletion of the project on the remaining floors other than the first floor, there would have been photographs of that state of incompleteness. He had been asked by Weaver, according to his own testimony, to take photographs showing what had not been completed.

"Just as significant, in my judgment, is the inspection by Lambert. This was made under circumstances where Lambert knew that Manufacturers was can-

celling the commitment letter. He read the handwriting on the wall. He knew that he had been asked to prepare an inspection report which, if called for, would justify (if possible) the position taken by Manufacturers. I have reviewed his report carefully, and it is, to say the least, not objective. In the first place, in making the examination, he shows some lack of familiarity with the plans and specifications. Of 238 apartments in the building, as I compute it, he found 67 okay; there was nothing that he could find wrong, not even a scratch on the walls. In other words, there were at least 67 apartments which tenants could have occupied on March 7. There were three that he said he couldn't inspect. There were approximately 100 apartments in which the items which Lambert said needed correction, were obviously of the most minor nature — which could have been corrected in twenty-four hours — what I consider to be a punch list item. There were fifteen more apartments where his comment was — 'Clean out hatch not plastered.' As Charles Mullan pointed out, the purpose of the clean out hatch would be completely nullified if you plastered over it. Obvious nitpicking.

"When I say minor items, I'm talking about this sort of thing: 'Room 311, bath, vanity fixture hung below outlet, wire shows,' — only one item in that room. So when I say minor, I mean petty. Where Lambert's report showed more than one item to be corrected in a room or suite, I have not considered that as minor. But even in the rooms which had several items which allegedly required correction, they were items that could have been corrected before a tenant would want to move in. For example, in Room 1102, 'Dining room electric light fixture not properly installed. Bath, ceiling plaster finished splotchy.' I dont' consider that minor, but obviously on the face of it, it is something that could be taken care of in one morning at most — probably fifteen minutes for the light fixture and an hour for the plaster job. The

only part of the building that was not in this minor or comparatively minor category was some of the exterior work and some of the suites on the 22nd and 23rd floors. Here we're dealing with an apartment house that has 238 apartments, ten of them on the top two floors. Ten out of 238, and even in those, the work was finished, according to the testimony before me, within a week after March 7, 1966.

"So that my finding, so far as the state of completion is concerned, is that the building was substantially completed. Again, the determination of the legal effect of this finding must await tomorrow's edition."

There were suggestions from time to time through the record that Tinley and Weaver Bros. did not want Manufacturers to know that the loan here was intended to cover the entire construction cost. There is some intimation that this was the reason that Tinley did not proceed with the closing of a construction loan with Manufacturers.

LIABILITY

At the conclusion of trial on the issue of liability and before presentation of evidence of damages the trial judge rendered an oral opinion which we adopt:

"CONCLUSIONS OF LAW

"We now come to the point in the case where I am required to make certain conclusions on the question of liability. As is true in most cases, these conclusions are in some instances exclusively legal, in others, they are combinations of fact and law.

"There are several preliminary questions which must be considered before I get to the ultimate decisions which must be made.

"I. *Weaver — Agent for St. Paul and Manufacturers.*

"The question of agency has arisen in this case. I have found as a fact that Weaver acted as agent for

both St. Paul and Manufacturers. In *Hogan v. Q. T. Corporation*, 230 Md. 69, 75, the Court of Appeals said that 'the existence of a principal-agent relationship is ordinarily a question of fact. * * * And since such relationship may be implied from the words and conduct of the parties and the surrounding circumstances, the question was properly submitted to the jury, and its verdict should not have been set aside.' So that such agency has been determined by me, sitting as a jury, as a matter of fact.

"II. *Weaver's Responsibilities as Agent.*

"Next, is the question of the responsibilities of Weaver as broker-agent. In *Hardy v. Davis*, 223 Md. 229, 232, the Court of Appeals had this to say on the subject of a real estate broker acting as agent for both parties: 'During the term of the agency, a real estate broker can not act for both vendor and vendee in respect of the same transaction because of possible conflict between his interest and his duty in such case, and he must disclose to his principal all facts or information which may be relevant or material in influencing the judgment or action of the principal in the matter. *Coppage v. Howard*, 127 Md. 512, 523; *Restatement (Second), Agency, Sec. 381.*' Of course, Weaver did act as agent for both, and, in my judgment that dual agency was known both by Manufacturers and by St. Paul. St. Paul had hired Weaver as its agent and broker, and yet it knew through the multitude of letters and phone and face to face negotiations that Weaver was also acting as agent for Manufacturers. Many of the communications were directed by Manufacturers to Weaver. As I recall it, none in writing were directed to St. Paul. So that the fact that Weaver was acting as agent for both parties did not, in and of itself, constitute a breach in violation of the holding in *Hardy v. Davis* (supra). Nevertheless, when one acts in such a dual capacity, one has an even greater responsibility to be sure that he walks

a straight line and acts in a fair manner towards both principals, than if he were acting for only one party.

"On the degree of care which an agent must exercise, 12 Am. Jur. 2d 847, Sec. 96, says that—

> 'As a general rule, a broker who is not a mere middleman, but is employed by a principal to act as his agent in a transaction, is bound to exercise reasonable care and skill, or the care and skill ordinarily possessed and used by other persons employed in a similar undertaking. He must exert himself with reasonable diligence in his principal's behalf, and is bound to obtain for the latter the most advantageous bargain possible under the circumstances of the particular situation. * * *
>
> '* * * A broker is not liable for a mere mistake in judgment which does not result from a failure to know or do that which a person of ordinary prudence under similar circumstances would know or do. * * *.'
>
> 'In the absence of special circumstances giving the principal a right to rely on the agent's skill and care, the principal has been held to be barred from recovering for the agent's negligence by his own contributory negligence.'

"In *Nagel v. Todd,* 185 Md. 512, at pages 516-517, the Court of Appeals had this to say on this subject: 'In *DeCrette v. Mohler,* 147 Md. 108, 115, this Court, speaking through Judge Walsh, said: "The principal duty of an agent is loyalty to the interest of his principal. The very nature of the relationship of principal and agent demands that the later give to the former the fullest measure of service in all matters pertaining to the agency, and that he devote all his skill and ability to securing the greatest legitimate benefit and advantage for his principal. Experience has taught us that no man can serve two masters, and for this reason it has long been an established rule of law

that an agent cannot recover from his principal in any transaction in which the agent's interest was antagonistic to that of the principal, unless such interest was fully and fairly disclosed to the principal" citing *Mechem on Agency*, 2nd Ed., Sec. 1588 et seq.'

"The responsibilties and duties of an agent are discussed in some other Maryland cases. In *Maryland Credit Finance Corp. v. Hagerty*, 216 Md. 83, 90, 92, the Court of Appeals, after quoting, as I have just done, from *DeCrette*, said: 'Where the breach of duty by the employee was wilful and material; as we find it to have been in the case before us, the Courts have held consistently that the employee has forfeited at least compensation which has not already been earned. The rule was recognized, although found inapplicable on the facts, in *Shipley v. Meadowbrook Club*, 211 Md. 142, 148. It was there said that: 'We accept the general principal that an agent who is guilty of fraud upon his principal, particularly where there is a conflicting interest, concealment, or a wilful and deliberate breach of his contract, may be denied compensation for his services.' There are a number of authorities cited at that point.

"In *Buffington v. Wentz*, 228 Md. 33, 38, the Court of Appeals said this: '* * * that the broker was under a duty to make full disclosure to his clients of all of the relevant facts which might influence the judgment or action of his principals.' citing several Maryland cases, and *Restatement, Agency, Second Edition*, Secs. 381, 398, 390; also 8 *Am. Jur. (Brokers)*, Secs. 89, 91.

"Again on this subject, *Coppage v. Howard*, 127 Md. 512, 523, the Court said: '* * * A broker employed to sell real estate occupies a *quasi fiduciary* relation to his employer, and in his dealings with him is bound to act in good faith and to make disclosures of matters that are material and might affect the action of his employer in the premises. This principal is fully recognized in this State.' citing three earlier Maryland cases.

"Finally on this subject, *Virginia Dare Stores, Inc. v. Schuman*, 175 Md. 287, 291-292, the Court said: 'It appears from the declaration heretofore referred to that this action is founded upon negligence in misrepresentation. No Maryland case has been found directly upon the subject, but the weight of authority in other jurisdictions seems to be that such action is not necessarily confined to injuries arising from contractual relations; that the action lies for negligent words, recovery being permitted where one relies on statements of another, negligently volunteering an erroneous opinion, intending that it be action upon, and knowing that loss or injury are likely to follow if it is acted upon.' citing a number of authorities.

"Referring to the argument of day before yesterday, Mr. Freishtat contended that Weaver had held itself out as having special skill in the subject of obtaining mortgage financing, such as is involved in this case, and that St. Paul and Williams had relied thereon to their loss. In response, Mr. Case contended that there was a failure of proof of special skill and reliance thereon, and also that there was a lack of expert testimony as to the standard of care required in such a case. In my judgment, this is not a case which requires the production of expert testimony. However, it appears that in this case, and in other cases like it, it's not so much a question of some higher degree of care, but of the degree of care one would expect of the particular person involved, whether he is a doctor, or a lawyer, or a real estate broker or specialist.

"The case which Mr. Case referred to in argument is *L. B. Laboratories, Inc. v. Mitchell*, 235 Pac. 2d 253, 257, had this to say: 'The courts have uniformly based recovery upon principles of negligence where there is failure to employ the knowledge, skill and judgment which is engaged to be rendered in professional employment, or other employment of a highly specialized nature. A member of the learned professions, and for

that matter any one who undertakes employment because of his possession of exceptional skill, impliedly represents that he possesses and will employ the degree of learning and skill usually possessed by those in good standing practicing their specialties in the same locality. He impliedly agrees to use his best judgment but does not guarantee results. *Roberts v. Parker*, 121 Cal. App. 264, 8 Pac. 2d 908. "In all those employments where peculiar skill is requisite, if one offers his services, he is understood as holding himself out to the public as possessing the degree of skill commonly possessed by others in the same employment, and if his pretentions are unfounded, he commits a species of fraud upon every man who employs him in reliance on his public profession. But no man, whether skilled or unskilled, undertakes that the task he assumes shall be performed successfully, and without fault or error; he undertakes for good faith and integrity, but not for infallibility, and he is liable to his employer for negligence, bad faith, or dishonesty, but not for losses consequent upon mere errors of judgment." (Cooley on Torts (4th Ed.), Vol. 3, p. 335).'

"III. *Commitment Letter — Time of Essence?*

"Next, one other preliminary question is whether time was of the essence in this contract, the commitment letter of June 7, 1963. It is my judgment, and I so hold, that time was not of the essence of this contract. My reasons for that holding are several. First, the language itself negates the idea of time being of the essence. The last paragraph says: 'The commitment may be cancelled,' not, as does the paragraph immediately preceding, that 'This commitment shall become void if by June 24, 1963 we have not received written acceptance of the same, * * *.' Clearly that paragraph was time was of the essence. If the refundable standby fee had not been paid and the offer contained in the letter had not been accepted by that date, that would have been the end of — the complete end

of the matter. So that you have that very definite difference in language. Now the only thing in the last paragraph that would make time of the essence is that a date is mentioned. However, when you compare the language of the two paragraphs it becomes obvious that, so far as the last paragraph is concerned, time was not considered of the essence.

"Another reason is that the law is clear that one who draws a contract can expect to have that contract construed against him. '* * * this Court cannot disregard the rule of construction of Contracts often restated by it, that where an ambiguity exists a contract will be most strongly construed against the one who prepared it.' *Kelley Construction Co., Inc. v. Washington Suburban Sanitary Com.*, 247 Md. 241, 250; *Hughes v. Pioneer*, 230 Md. 36, 38; *Ebert v. Millers Fire Ins. Co.*, 220 Md. 602, 611; *Cadem v. Nanna*, 243 Md. 536, 544. This rule is particularly applicable to insurance contracts. Although this is not an insurance contract, it is a contract drawn by an insurance company; and there is a reasonable inference that they were familiar with that rule of law.

"Another reason for my holding on this point is that Manufacturers knew that, if this commitment were accepted and if it were followed by a construction mortgage loan so that the project would go forward, St. Paul would expend large sums of money in reliance upon commitment, and also knew of the possibility, at least, that exactly what did occur, might occur.

"Finally, the construction placed upon this contract by the actions of the parties. When September 7, 1965, arrived, what did Manufacturers do? Did it say, stop, you have not met the date specified in the last paragraph? No, it not only did not say stop, it gave a six months extension — six months additional life to the agreement. So that it is clear not only that time was not of the essence, but that the parties did not consider it to be.

"There are two Maryland cases which I have found that deal generally with this subject, and which throw some light upon it. The first of these is *Scarlett v. Stein*, 40 Md. 512, 525-526. There, the Court said: 'Parties may, no doubt, make *time an essential part of a contract*, and in such cases, the failure by one of the parties to perform his part of the obligation within the time prescribed, discharges the other from all liability under the contract. Whether time is to be considered *as of the essence of the contract*, must, of course, depend upon the intention of the parties. When this intention is expressed in clear and unambiguous terms, the contract must speak for itself, and the liability of the parties must be determined by the plain and obvious meaning of the language used. If, however, this intention is not expressed in clear and direct terms, courts may look to the acts and conduct of the parties, in order to find out the meaning which they themselves have put upon the contract.' And that is why I have emphasized the factual phase of this problem, because from such facts one can ascertain that the intention of the parties was that time was not of the essence. Also bearing on this subject is *Kasten Constr. Co., Inc. v. Maple Ridge Constr. Co., Inc.*, 245 Md. 373, 377. There, the Court said: 'In a case involving specific performance, where the intention of the parties is always the controlling factor, the general rule is that time is not of the essence of the contract of sale and purchase of land unless a contrary purpose is discovered by its terms or is indicated by the circumstances and object of its execution and the conduct of the parties. * * * Ordinarily, however, time is held to be of the essence only when it is clear that the parties have expressly so stipulated or their intention is inferrable from the circumstances of the transaction, the conduct of the parties or the purpose for which the sale was made.', citing a long list of Maryland cases.

"Now, as I said once before, we come to the nitty gritty. I have tried to sift from my recollection of the declaration, from all of the facts and from argument of counsel, what I consider to be the questions which I have to consider and decide. They are as follows, without comment, in the first instance:

"First, the contention that Weaver and/or (I hate that expression but it applies here) Manufacturers alleged delay in approving the plans and specifications constituted negligence so far as Weaver and/or Manufacturers is concerned. Subsidiary to that question, even if one or both were negligent, was such negligence the proximate cause of any loss or damage sustained by St. Paul?

"Second, the contention that Weaver was negligent in its failure to procure a commitment for a construction mortgage loan.

"Third, the contention that Weaver's failure to button up Manufacturers' offer of a construction mortgage loan commitment constituted either a breach of contract or negligence on the part of Weaver.

"Fourth, whether by virtue of some act, or failure to act, Weaver has forfeited its right to retain the $48,000 fee paid it for obtaining the permanent mortgage loan commitment.

"Fifth, whether Manufacturers' cancellation of the permanent mortgage loan commitment constituted a breach of contract on its part.

"*First.* A great deal of the testimony before me and many of the exhibits are related to the question of delay, *vel non*, in the approval of the plans and specifications. * * *[E]ven if there were negligence it was not the proximate cause of any damage which has been sustained by St. Paul.

"*Second.* It is contended that Weaver was negligent in its efforts to procure a commitment for a construc-

tion mortgage loan. At this point, I'm not going to consider the question of Manufacturers' offer. * * * I cannot find from the evidence that St. Paul has met the burden of showing that Weaver was negligent in its failure to procure a commitment for a construction mortgage loan. And once again, I'm not referring to Manfacturers' offer.

"*Third.* We come to the allegation that Weaver was negligent in its failure to button up Manufacturers' offer of a construction mortgage loan commitment. If we bear in mind the authorities which I cited at the beginning of this opinion concerning the responsibility of an agent, particularly his responsibility to make full disclosure to the principal, what Weaver did in this case becomes of major significance. This is not a case of mere failure to disclose. Weaver knowingly made a misstatement of fact. On October 10, 1963, Williams told Tinley that he accepted Manufactureres' offer of a construction mortgage loan commitment and that Tinley should close it immediately. Tinley's response was that the offer was no longer open, that it had not been accepted promptly enough. And yet the evidence is clear beyond a doubt that the offer was still open on that date (and remained open, as a matter of fact, down to the very day that the Chemical construction mortgage loan was buttoned up) and that Weaver knew this. This was a clear breach of a duty which Weaver owed St. Paul, and I so hold.

"*Fourth.* Is Weaver liable for return of the $48,000 fee which it was paid for obtaining the permanent mortgage loan commitment? You will recall that in one or two of the authorities to which I referred in the beginning of the opinion, it was stated that for breach of duty an agent could lose a fee otherwise coming to him unless it had been earned. This poses a problem in this case because St. Paul agreed to pay Weaver $48,000 for obtaining a permanent mortgage loan commitment, and another $48,000 for obtaining a construction mortgage loan commitment. Weaver

did obtain the former; so that, from that point of view, it had earned $48,000. However, when you look at all the evidence, particularly what transpired at the end, you have here a concern which, under the facts as I have found them, was acting as agent for St. Paul on the one hand and for Manufacturers on the other, and owed a great responsibility to each because of that dual relationship. Yet at the very end, it's all for Manufacturers, nothing for St. Paul. Tinley goes to the building and inspects it not once but on several occasions without Williams being there. The only reasonable inference that can be drawn from that is that such inspections were to be reported to Lamon.

"Weaver hires a photographer to take pictures. Of what? If Weaver was, in good faith acting as agent for both, photographs would have been taken of what had been completed properly as well as everything that had not been completed. However, according to Defendants' own witness, he was instructed to take photographs of portions of the building which had not been completed.

"Lambert's inspection on March 8th and the 9th starts out at Weaver's office, moves from there to the building.

"The circumstances under which the letters of March 29 and March 30 were obtained from Cogswell and Neumayer — Cogswell, Tinley and two representatives of Manufacturers, were at Weaver's — not Williams or any representative of Williams. The following day the same thing happened. A letter was obtained from Neumayer. Williams was not present. Two representatives of Manufacturers were — also Tinley. You have the Gottschalk and Grant incident, where Tinley was hopeful of peddling the whole deal to them, being fearful that Williams could not go through with it. So that you have a series of acts which show that, while they were transpiring, Weaver did not act as it should have towards one of its two principals. If Weaver had

spoken up, as agent for Williams and St. Paul, and said to Lamon, here, this building is for all practical purposes complete, in a week or ten days or two weeks we can have tenants moving in and the income stream will start to flow — who knows but that Lamon and Manufacturers might have taken a different view of canceling the contract. However, Manufacturers did cancel the contract. So that the service which Weaver had rendered, and which under other circumstances would have earned it its fee, was lost, lost completely so far as St. Paul was concerned. It is my judgment that the conduct of Weaver, which I have just described in some detail, requires a finding against it on that count of the declaration which seeks the return of the $48,000 fee, and I so hold.

"*Fifth.* Finally we come to Manufacturers canceling the permanent mortgage loan commitment. Mr. Case said yesterday, and I agree with him, that the words, 'It is understood' are synonymous with 'It is agreed.' I read the case to which he referred, the *Phoenix Iron and Steel Co. v. Wilkoff Co.*, 253 F. 165, 167-172. It is highly persuasive. It is my judgment that 'It is understood' is just the same as 'It is agreed', and that is the agreement which is set forth in the third paragraph of Plaintiff's Exhibit No. 4. Now what is that agreement? The meat of it is, 'It is understood that our funds will not be required until we receive a report from your inspector certifying that construction of the building has been satisfactorily completed', and then goes on to the part concerning the certificates required. What does satisfactory mean? I have just purchased what the New York Times Book Review Section says is the best dictionary ever published, edited by The American Heritage. The second definition there of the word satisfactory is adequate. Webster's New International, Second Edition, defines satisfactory as follows: (None of the first definition applies here) 'giving or producing satisfaction; yielding content; as: adequate for the purpose; offering

adequate treatment or fullness of detail; of a kind to meet all requirments or expectations; explaining fully; serving to allay the demands of a questioner or challenger; relieving the mind from doubt or uncertainty; as a *satisfactory* pension, report, marriage, provision, excuse.' The synonym is stated as adequate, satisfying, expiatory. The antonym is unsatisfactory or inadequate. So that satisfactory does not mean perfect. It does not mean absolute. It does not mean to the last nut and bolt. And that is borne out by the construction placed upon the word by Lamon. He was perfectly candid in his testimony before me. He said that roll over would not have been stopped by the fact that the commercial space on the first floor was not complete; that roll over would not have been stopped by the fact that a punch list had to be completed; that roll over would not have been stopped by a combination of those two factors. It's obvious to me from his testimony that he did not interpret satisfactory as complete one hundred percent, down to the last nut and bolt. It necessarily follows, that, if it's not absolute, final, complete without anything of any kind no matter how minute remaining to be done, it is a question of degree. And degree brings us inevitably to the question of substantial compliance.

"Substantial [Performance], in 17 Am. Jur. 2d (Contracts), page 818, section 375, is described as follows: 'Although there is some early authority in support of the rule that a party must strictly or literally perform the stipulations on his part before the other party is obligated to perform, unless the promises are independent, the modern authorities support a more liberal rule. Thus, it is said that the law looks to the spirit of a contract and not the letter of it, and that the question therefore is not whether a party has literally complied with it, but whether he has substantially done so. This has long been the rule in equity. Accordingly, the courts now state that substantial, and not exact, performance accompanied by good faith is

all the law requires in the case of any contract to entitle a party to recover on it.' And then skipping to the next page, 'While the doctrine of substantial performance is applied most frequently in building and construtions contracts, it is not so limited and may be applied in the case of any kind of contractual obligation to perform.' Now in the first quotation it is stated that 'performance accompanied by good faith is all the law requires', and I don't think that anyone can say that St. Paul and Williams did not operate in good faith. They did everything possible to push for the completion of the project by the 7th of March, 1966.

"There is also a note in 76 A.L.R. 2d 815 et seq., which admittedly is related only to construction contracts, but where cases are cited from almost every state in the Union. All the leading authorities follow this rule of substantial compliance — Illinois, Massachusetts, Michigan, New Jersey, New York, Pennsylvania.

"In Maryland, it has been applied. At the time of the decision on the Motion for Summary Judgment, I referred to the case of *First National Realty Corp. v. Warren Ehret Co., Inc.*, 247 Md. 652, 656. There are several portions of that opinion to which I wish to refer. It's just as good law today as it was when we had the Motion for Summary Judgment. In that case there was a requirement that the work be approved by the architect, like we have here. The Court had this to say: 'If we were concerned with only the question of substantial performance, this case could be put to rest with the decisions of this Court * * *' citing several cases including *Evergreen Amusement Corp. v. Milstead*, 206 Md. 610, 621, opinion by Judge Hammond, which is to the same effect. Then it goes on to say, 'However, this case presents the further question of the effect to be given the express wording of the contract set forth in paragraph numbered "Twenty-fifth" which specifically provides that the "opinion" of the contractor will control in deciding whether the

subcontractor (Warren-Ehret) prosecuted the work with promptness and diligence or failed in the performance of any of the agreements contained in the contract.

" 'There are a number of Maryland cases which have dealt with the question of the performance of a contract to the satisfaction of one of the parties, * * *.' That, in substance, is what we have here. The Court then proceeded to cite a number of authorities in and out of the State, including textbooks, and went on to say, in quoting from 13 Am. Jur. 2d (Building & Construction Contracts), section 30, page 32, where the architect or the owner or somebody has the final say, 'Nevertheless, even under the latter view, the owner's claim of dissatisfaction must be made in good faith, and this is ordinarily a question of fact for the jury.' The Court went on to say (page 660), '* * * whether the objective criteria (i.e., reasonable-man rule) or subjective criteria (i.e., the individual personal satisfaction of the owner) must be met, the Courts, with very few exceptions, have asked the question whether the action on the part of the owner was capricious or arbitrary, and if such action was present it vitiated the quality of the reasonableness of the owner's action in the objective criteria cases and his good faith in the subjective criteria cases.'

"Referring (page 661) to a Pennsylvania decision, *Hood v. Meininger*, 377 Pa. 342, 347, the Court said, '* * * where the Court in rejecting the "reasonable man" test and adopting the subjective criteria test, found in favor of the owner and against the contractor stating: "* * * (1) that the dissatisfaction must be genuine and not prompted by caprice or bad faith, and (2) that if the work is not sufficiently completed for a reasonable determination whether it was or would be satisfactory, then the rejection is premature".' "

"Interestingly enough, what brought the problem in *First National v. Warren-Ehret* to a head was a tor-

rential downpour of four to five inches which inundated parts of the building and, as the trial judge said, snapped the patient of the contractor and triggered the dismissal of the roofer, and triggered the termination of the contract. I have no doubt that, in the present case, if there had not been the damage to the 22nd and 23rd floors from leakage, Manufacturers would not have had the gall or the nerve to cancel the contract as it did.

"Now looking at contracts in general, the law applicable to contracts and what happened in this case, was Manufacturers justified in canceling its commitment? It had agreed with Chemical Bank and New York Trust Company that 'At any time on or before September 7, 1965 (or the last day to which the commitment may be extended, if any extension thereof has been made as provided herein), if the conditions of the Commitment have been fulfilled, you agree to purchase and we agree to sell the Note for $4,800,000.' St. Paul was the beneficiary of that contract. Now, what are the facts and circumstances surrounding the cancellation? In the first place, I am persuaded from all of the evidence that the only stated reason for the cancellation, before the fact, was that the building was not complete. I am persuaded, as Lamon described Williams' reference to the cause of the leaks, viz., a snowstorm — that it was an afterthought to say that the certificates had not been furnished. Although it is not necessary to hold this, there is some law that if one states a reason for cancellation of a contract, they're stuck with it. They can't later on try to drag in some other reason or excuse. That's the case that Mr. Freishtat referred to in his argument yesterday, *Brush-Swan Electric Light Co. of New England v. Brush Electric Co.*, 41 Fed. 163, at pages 168-169. In determining the answer to this question, it is necessary that the Court bear in mind, that basically, the law frowns on forfeitures of any kind. That's what the effect of this cancellation was — all that had been

expended on that building at the date of cancellation was lost, so far as St. Paul was concerned. The evidence discloses, based upon my findings of fact, that although Weaver had not told Manufacturers about Williams' poor credit experience in Virginia, had not told Manufacturers that Williams had no money of his own to invest in this project, had merely told Manufacturers that the project had to be one hundred percent financed, I have found that Weaver was Manufacturers' agent, and as such all that information was chargeable to Manufacturers. We then have the February 28, 1966, visit to Baltimore by Lamon, when he learned that Williams might be on thin ice, that he was unhappy with his contractor, that he was considering suit against the contractor, that he was threatening not to pay interest if there were a roll over, until he ironed out his problems with Mullan. These were all matters which I can understand worried Lamon tremendously, but matters which he had no legal right to consider, none at all. He had no right to speculate, even though it was a reasonably good speculation, as to what would happen in the event there was a roll over. Many things might have happened which could have bailed out Williams after a roll over, which would have enabled him to preserve the status quo. But, in any event, whether they would or would not have happened, Lamon had no legal right to anticipate that they would. He had an obligation to live up to his contract, if the other party had lived up to its. I am persuaded beyond any doubt that the reason for the cancellation of this contract was, first, a calculation risk taken by Manfacturers that if it didn't accept the roll over, and if the construction mortgage were foreclosed, and if Manufacturers were sued, that it could weather the storm, either by avoiding liability completely, or if subjected to liability, by minimizing damages. They took that calculated risk, and they're stuck with the result. It is my judgment, and I so hold, that first, this building was sub-

stantially completed, and that was all that was required so far as the contract was concerned; second, that Manufacturers had more than adequate protection by escrow of funds sufficient to complete the building, at which point the necessary certificates would have been forthcoming. So that, so far as the roll over was concerned, Manufacturers had every legal and practical protection it needed, or could have arranged for such legal and practical protection and was obligated to accept the roll over; that in not accepting the roll over, it breached its obligations under the loan commitment and under the Buy-Sell Agreement of which St. Paul was the beneficiary.

"Now, thus endeth this lesson. We now have to recess for as much time as counsel want to prepare for trial of the question of damages."

PREJUDGMENT INTEREST

The trial judge allowed prejudgment interest on the deficiency decree from the date of entry of that decree down to the date of his judgment. After quoting extensively from the opinion of Judge Sobeloff (a former Chief Judge of this Court), in *Robert C. Herd and Company, Inc. v. Krawill Machinery Corp.*, 256 F. 2d 946 (4th Cir. 1958), he said:

"It is my judgment that the exercise of judicial discretion requires the award of interest on the amount of the deficiency decree from the date of the entry of that decree down to the date of this judgment. I have considered whether or not interest should be awarded on any other phases of this case, and have determined that to allow interest on the other judgments nisi would constitute an abuse of judicial discretion."

St. Paul and Williams take issue with this, quoting further from *Herd*, asking the Court to take judicial cognizance of the fact that "delay is the best defense", stating that St. Paul "was left impoverished and destitute and faced with huge obligations, on all of which interest was and is

accruing, while the Defendants were using the monies wrongfully withheld from St. Paul to their advantage, during a period of spiraling interest rates", and suggesting that the trial judge abused his discretionary powers.

In *Atlantic States v. Drummond & Co.*, 251 Md. 77, 246 A. 2d 251 (1968), Judge McWilliams said for the Court:

> "Ordinarily the matter of interest is left to the discretion of the jury or the court sitting without a jury. In *Affiliated Distillers Brands Corp. v. R.W.L. Wine & Liquor Co.*, 213 Md. 509, 516, 132 A. 2d 582 (1957), we said:
>
> > 'However, this general rule is subject to certain exceptions that are as well established as the rule itself. Among the exceptions are cases on bonds, or on contracts, to pay money on a day certain, and cases where the money has been used. If the contractual obligation be unilateral and is to pay a liquidated sum of money at a certain time, interest is almost universally allowed from the time when its payment was due. [Citing cases.]'
>
> To the same effect see *Mullan Contracting Co. v. International Business Machs. Corp.*, 220 Md. 248, 151 A. 2d 906 (1959)." *Id.* at 85.

In *City Pass. Ry. v. Sewell*, 37 Md. 443 (1873), our predecessors said:

> "It must be conceded that interest is not an inseparable and invariable incident of claims for money, or unliquidated accounts. 'It is recoverable as of right, upon contracts in writing to pay money upon a day certain; as upon bills of exchange and promissory notes, or on contracts for the payment of interest, or where the money claimed has been actually used, and upon bonds, etc., but in other cases, *it is a question entirely for the jury to be decided according to the equities of the transaction.' Newson v. Douglass*, 7 H. & J. 417; *Karthaus v. Owings*, 2 G. & J. 430." *Id.* at 452 (emphasis in original).

See also A. & A. Masonry v. Polinger, 259 Md. 199, 203-204, 269 A. 2d 566 (1970), which quoted both of the above cases. As *Brantly on Contracts* (2d ed. rev. 1922) puts it:

> "*Interest* is recoverable as of right upon all contracts to pay money upon a day certain, as upon bills of exchange, or where goods sold and delivered are to be paid for at a given time. In other cases the allowance of interest is within the discretion of the jury." *Id.* at 460.

A contract to loan money can not be equated with a contract to pay money on a day certain. The trial judge was the trier of fact. His statement relative to judicial discretion was entirely in accord with the Maryland authorities.

Punitive Damages

The trial judge allowed punitive damages on both the first and second counts of the declaration. As previously indicated, the first count was a pure contract claim, while the second count alleged negligence by Weaver Bros. in the performance of its contract with St. Paul.[1] Judge Proctor in his award recognized the general rule that in a contract action punitive or exemplary damages are not recoverable, citing 22 Am. Jur. 2d *Damages* § 245 (1965) and 5 *Corbin on Contracts* § 1077 (1964). A comment to the same effect is to be found in *Restatement of Contracts* § 342 (1932). The award on the first count was made on the strength of *Brown v. Coates,* 102 App. D.C. 300, 253 F. 2d 36, 67 A.L.R. 2d 943 (1958). No Maryland authority was cited to support the allowance of punitive damages in this type of case.

The Maryland rule relative to punitive damages was most recently summarized for the Court by Chief Judge Hammond in *Damazo v. Wahby,* 259 Md. 627, 270 A. 2d 814 (1970), where he said:

---

[1] Punitive damages were claimed on all of the tort counts of the declaration, but on none of the contract counts including the first count.

> "The Maryland rule is that malice in the sense of deliberate and improper violation of a known right, that is, absence of legal justification, will support an action and permit recovery of compensatory damages for deprivation of known contractual rights but that actual malice must be shown to support punitive damages. *Knickerbocker Co. v. Gardiner Co.*, 107 Md. 556; *Stannard v. McCool*, 198 Md. 609; *Heinze v. Murphy*, 180 Md. 423. There is no evidence here to show more than that Damazo wanted to benefit himself by receiving the gross purchase price without diminution for commissions and the various purchasers wanted to pay a lesser purchase price that the avoidance of the earned commissions would permit." *Id.* at 638-639.

In *Damazo* a broker claimed commissions on the sale of apartment properties and damages for tortious interference with and conspiracy by the sellers and buyers to deprive him of contract rights. The trial court found the broker was the procuring cause of the sale, that the two parties tried to bypass the broker, and awarded the commissions earned, nominal compensatory damages, and punitive damages. This Court affirmed on liability but reversed relative to punitive damages.

The classic case in Maryland on punitive damages involving tortious interference with a contract is *Knickerbocker Co. v. Gardiner Co.*, 107 Md. 556, 69 A. 405 (1908). There a dairy company had a contract with an ice company by which the ice company was to supply the dairy company with ice during a certain season at a designated price. The ice company procured large quantities of ice from Knickerbocker, a company manufacturing ice. Knickerbocker, knowing of the existence of the contract between the dairy company and the other ice company and intending to obtain a benefit for itself, notified the other ice company that if it sold ice to the dairy company Knickerbocker would refuse to supply any ice to it. Consequently, the ice company broke its contract with the dairy company and that company was compelled to purchase ice from Knickerbocker at a price higher than that stipulated for in its con-

tract with its original supplier. Punitive damages were claimed. Chief Judge Boyd said for our predecessors:

> "But the difficulty is that there is no evidence of malice in this case, unless it be such as some of the cases speak of — that the intention to benefit the defendant, or to injure the plaintiff, is to be treated as evidence of malice. But we have found no case in which exemplary damages were allowed for malice implied from such facts. The facts stated in the first prayer are in our judgment sufficient to entitle the plaintiff to recover, but we do not think they authorize recovery of exemplary damages, and there was not sufficient evidence outside of those facts to authorize the submission of this prayer. We do not mean to say there may not be such damages in cases of this character, for if, for example, there was evidence tending to show that the defendant had caused the contract to be broken for the sole purpose, and with the deliberate intention of wrongfully injuring the plaintiff, exemplary damages might be recovered, but when the object was merely to benefit itself, although the plaintiff would be thereby injured, there would be no more reason for allowing such damages than there would be in a suit by one party to a contract against the other for breach of it." *Id.* at 569-570.

Cf. Rinaldi v. Tana, 252 Md. 544, 250 A. 2d 533 (1969), as commented upon in *Damazo*, 259 Md. at 639.

It is true, as St. Paul urges, that there has been discussion in the Maryland cases of wanton conduct as permitting the recovery of punitive damages. These cases include *Moore v. Schultz*, 31 Md. 418 (1869); *Sloan v. Edwards*, 61 Md. 89 (1883); *Philadelphia, W. & B. R.R. v. Hoeflich*, 62 Md. 300 (1884); *Baltimore Transit Co. v. Faulkner*, 179 Md. 598, 20 A. 2d 845 (1941); *Heinze v. Murphy*, 180 Md. 423, 24 A. 2d 917 (1942); *Dennis v. Baltimore Transit Co.*, 189 Md. 610, 56 A. 2d 813 (1948); and *Vancherie v. Siperly*, 243 Md. 366, 221 A. 2d 356 (1966). Comfort is derived from such comments as that of Judge Delaplaine

for the Court in *Baltimore Transit Co. v. Faulkner*, where at page 602 "wanton" was defined as: "Characterized by extreme recklessness and utter disregard for the rights of others." None of these cases arose from contract actions. We interpret the language of those cases which speak of wanton conduct or wantonness as being a basis for awarding punitive damages as referring to such conduct as would carry an implication of malice or as conduct from which one would draw a necessary inference of malice, conduct from which one might determine the existence of actual malice. There is no evidence of malice in this case. The sum total of the conduct of Weaver Bros. in this case is but little different from the conduct in *Knickerbocker* where Chief Judge Boyd said, "[W]hen the object was merely to benefit itself, although the plaintiff would be thereby injured, there would be no more reason for allowing such damages than there would be in a suit by one party to a contract against the other for breach of it." Accordingly, upon the basis of the prior Maryland holdings, we conclude that the conduct of Weaver Bros. was not such as to warrant punitive damages.

DAMAGES — MANUFACTURERS — LOSS OF BUILDING

St. Paul upon the strength of its conception of *Hadley v. Baxendale*, 9 Exch. 341, 5 Eng. Rul. Cas. 502 (1854), contends most strongly that it is entitled to recover $7,920,000 for its loss of the property and $2,465,000 for its loss of the business, the latter figure being the difference between its valuation of $7,265,000 for the business and the mortgage of $4,800,000. It says that at the time of the contracting Manufacturers had valued the building and land at $7,920,000 and valued the use of the building on an income basis of $7,265,000. It is correct in those statements.

The *Hadley v. Baxendale* rule is succinctly summarized in *Brantly on Contracts* (2d Ed. rev. 1922) in the following language:

> "The damages which a plaintiff is entitled to recover for a breach of contract 'should be such as may

fairly and reasonably be considered as either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach of it.'" *Id.* at 457.

* * *

"When a contract has been made under special circumstances and these were communicated to the defendant then, in case of a breach, the plaintiff is entitled to recover as damages the amount of the injury which would ordinarily follow from a breach. But whether such special damages may reasonably be supposed to have been in the contemplation of both parties depends upon how much of the real situation was so disclosed.

"The special circumstances which may render a breach more than ordinarily injurious to the one party must be known by the other party whom it is sought to charge with the loss, at the time the contract was made and not afterwards." *Id.* at 459.

This was a contract to lend money. *Restatement of Contracts* § 343 (1932) states upon this subject:

"Damages for breach of a contract to lend money are measured by the cost of obtaining the use of money during the agreed period of credit, less interest at the rate provided in the contract, plus compensation for other unavoidable harm that the defendant had reason to foresee when the contract was made."

5 *Corbin on Contracts* § 1078 (1964) states the rule:

"The better rule and the one generally followed is that for breach of a contract to lend money the borrower can get judgment for damages measured by his resulting injury so far as the defendant had reason to foresee such injury when the contract was made. This is the rule applicable to contracts in general, and

a lender of money should be subject to it like other contractors. Doubtless there are many cases in which he has no reason to foresee that the borrower will be unable to secure money elsewhere or that there will be special injuries; but if he has such reason he must make good the loss. There are many well considered cases that have applied this rule." *Id.* at 447-448.

11 *Williston on Contracts* § 1411 (3d Ed. Jaeger 1968) states:

"It will frequently happen that the borrower is unable to get money elsewhere, and, if the defendant had notice of the purpose for which the money was desired, he will be liable for damages caused by the plaintiff's inability to carry out his purpose, if the performance of the promise would have enable him to do so." *Id.* at 614.

In *F. B. Collins Inv. Co. v. Sallas*, 260 S.W. 261 (Tex. Civ. App. 1924), the loss to which a landowner was entitled in a situation such as this was summarized:

"It is the landowner's interest in the land, represented by the value of his equity, that he would be entitled to as compensation. For legally the value of the equity is his only 'actual loss.' The value of the equity is not measured, as a matter of law, by the amount of the purchase price paid in cash for the land in the first instance. The value of this equity must appear and be established at the time the title is lost. For the value of the equity at the time the title is lost may or may not be the same as at the time of the original purchase by the landowner. The market value of the land rises and decreases, according to conditions and circumstances. If the market value of land goes below the original purchase price paid, the value of the equity would consequently be less and, on the other hand, the value of the equity would be greater if the market value of the land should be greater than the original purchase price paid. In either event the land-

owner could recover the value of his equity, and no more." *Id.* at 265.

See also Avalon Const. Corporation v. Kirch Holding Co., 256 N.Y. 137, 175 N.E. 651 (1931).

It does not appear from this record that St. Paul was able to go into the marketplace and obtain a loan elsewhere in the time available to it. The foreclosure sale by Chemical took place on June 1. Fruitless efforts were made by St. Paul to obtain funds elsewhere. As Judge Proctor put it:

> "[T]he next to the last paragraph [of the permanent mortgage loan commitment] clearly contemplated an antecedent construction mortgage loan and the execution of a Buy-Sell Agreement. This is standard procedure in a transaction such as this. In the first instance the funds are obtained from the construction mortgage lender. The permanent mortgage lender agrees to buy the promissory note, secured by the assignment of a Deed of Trust, from the construction mortgage lender upon the completion of the project. It is contemplated that the borrower will use the funds to build the proposed project — to pay direct and indirect construction costs. In such a transaction the parties, of course, anticipate that everything will proceed according to Hoyle — that there will be no breach by either party. On the other hand, the would be permanent mortgage lender must contemplate that if, at the last minute, it cancels its commitment such action would be disastrous to the borrower; that in such event obtaining a new permanent mortgage loan would be well-nigh impossible, for the reason that whatever brought about the cancellation would in all likelihood prevent another lender from entering the fray; that one doesn't find someone willing and able to lend $4,800,000 at a moment's notice; that, under such circumstances, foreclosure under the construction mortgage would not only be a probability, it would be almost inevitable."

Accordingly, St. Paul under the circumstances here was entitled to more than nominal damages.

The trial judge here determined that at the time of the loss St. Paul had no equity in the property. In other words he determined the value of the complete building to be not greater than the mortgage. There was ample evidence to sustain this conclusion upon his part. Under Maryland Rule 886, this finding would not be disturbed by us if this were one of the issues specifically argued on appeal. The position of St. Paul is that because a tentative value of the building was assigned by Manufacturers in making its loan that this becomes the criteria for determining damages.

St. Paul misunderstands the application of the rule. It would have been the loss of the building which the parties would have foreseen at the time of entering into the contract. It does not follow that the value of the building and, therefore, the amount of the loss is established by the parties at that time. Judge Proctor was entirely correct in determining that the loss was the equity, if any, in the building. There was no equity. Therefore, he was correct in allowing nothing for loss of the building.

St. Paul would also place a valuation on the business and claim the loss of that. On the issue of lost profits, which was but another way of claiming the loss of the value of the business, the trial judge said:

"(1) *Alleged Loss of Profits.*

"In *Lawson v. Price*, 45 Md. 123, 139, appellee brought an action against appellant for obstructing the mill race leading to his distillery. It was held that lost profits could be recovered as an element of damage because they could be ascertained with reasonable certainty. In doing so the Court cited, with approval, Sedgewick on Damages, 89, as follows:

> 'It may now be assumed to be the general rule that in actions of tort, where the amount of profits of which the injured party is deprived, as a legitimate result of the trespass, can be shown with

> reasonable certainty, such profits constitute *to that extent* a safe measure of damages. In these cases, the rule adopted with reference to certain breaches of contract which makes the offending party liable for the loss of profits, so far only as he foresaw, or should have foreseen that particular consequence of his act, does not apply. He who commits a trespass must be held to contemplate all the damages which may legitimately follow from his illegal act, whether he might have foreseen it or not; and so far as it is plainly traceable, he should make compensation for it. To this extent, the recovery of a sum equal to the profits lost, while fairly within the principle of compensation, is also within the limits which exclude remote consequences, from the scale in which the wrong is weighed.'

"In *Winslow Elevator Co. v. Hoffman,* 107 Md. 621, 640-1, the owner of a building (recently constructed) had brought suit against the elevator contractor for, among other things, loss of rents from the building allegedly attributable to the defective elevator. The Court held as follows:

> '* * * In *Wolcott v. Mount,* 36 N.J.L. 269, the Court said: "It must not be supposed that, under the principle of *Hadley v. Baxendale,* mere speculative profits, such as might be conjectured to have been the probable results of an adventure which was defeated by the breach of the contract sued on, the gains from which are entirely conjectural, with respect to which no means exist of ascertaining, even approximately, the probable results, can, under any circumstances, be brought within the range of damages recoverable. The cardinal principle in relation to the damages to be compensated for on the breach of a contract, that the plaintiff must establish the quantum of his loss by evidence from which the jury will be able to estimate the extent of his injury, will exclude

all such elements of injury as incapable of being ascertained by the usual rules of evidence to a reasonable certainty."

'When the claim of the plaintiffs for the recovery of lost rent is considered in the light of these rules it certainly must be denied. What rent they might have received from the building was not only dependent upon collateral engagements with persons who might rent the rooms, but upon many other considerations, such as location, desirability of rooms, the amount of rent asked, light and air, competition of other buildings, the number of tenants, the ability of the owners to keep the rooms occupied, and the general character of the management of the building. There are so many elements of uncertainty which enter into and affect the question that any estimate of loss could be little short of a guess. The special damages sued for in this case are so uncertain and incapable of reasonable ascertainment that they cannot be recovered.'

"In *Evergreen Amusement Corp. v. Milstead,* 206 Md. 610, 618, the operator of a new drive-in movie theatre, in a suit by a contractor, counterclaimed for alleged loss of profits attributable to the delay in the work. The Court of Appeals held that because the venture was new profits were too uncertain to form a basis for recovery, saying:

'* * * on the other hand, loss of profits from a business which has not gone into operation may not be recovered because they are merely speculative and incapable of being ascertained with the requisite degree of certainty. *Restatement, Contracts,* Sec. 331, states the law to be that damages are recoverable for profits prevented by breach of contract "only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty" * * *'

See also: *M. & R. Builders v. Michael*, 215 Md. 340, 352, where the Court of Appeals cited a number of cases in which plaintiffs were not allowed to recover '*collateral, estimated* and *probable* profits claimed to have been lost.'; *Abbott v. Gatch*, 13 Md. 314, 332-4; *Lanahan v. Heaver*, 79 Md. 413, 418-23.

"Reference to the hypothetical question put to the witness Hoffman by Plaintiff's attorney (objection to which, incidentally, should have been sustained by the Court) is sufficient to demonstrate that the alleged loss of profits from this venture were completely speculative. Realization of profits from a new untried venture such as this depends on so many uncertainties that they cannot form a proper element of damage in a contract action, and I so hold."

We adopt that opinion.

COMPUTATION OF DAMAGES

In computing damages we start with the comment of this Court in *Casualty Ins. Co. v. Messenger*, 181 Md. 295, 29 A. 2d 653 (1943), involving application of the *Hadley v. Baxendale* rule. There a liability insurance policy was issued covering operations of a tractor and trailer within a radius of 500 miles of Salisbury. An accident occurred in South Carolina which the company held not to be within a radius of 500 miles of Salisbury. Judgment was obtained against the insured and his tractor and trailer were levied upon and sold by the sheriff at auction in South Carolina. The insured brought suit in Maryland for the loss of his tractor and trailer. He established the point of accident to have been within a radius of 500 miles of Salisbury. In sustaining the action of the trial court and jury in awarding a verdict to the insured for the loss of his vehicles, Judge Delaplaine said for the Court:

"The court should endeavor to place the injured person, as far as possible by monetary award, in the position in which he would have been, if the contract had been properly performed. *Chamberlain v. Baltimore*

& Ohio R. Co., 66 Md. 518, 529, 18 A. 267; *United States v. Behan*, 110 U.S. 338, 4 S. Ct. 81, 28 L. Ed. 168." *Id.* at 301-02.

(i) First Count

The trial judge allowed $5.00 compensatory damages and $50,000 punitive damages. We have already indicated that he erred in allowing the punitive damages. Under Rule 886 "the judgment of the lower court will not be set aside on the evidence unless clearly erroneous and due regard will be given to the opportunity of the lower court to judge the credibility of the witnesses." Accordingly, the $5.00 compensatory damages on that count must stand.

(ii) Second Count

The trial judge allowed $100,000 punitive damages and $185,167.40 in compensatory damages, the latter figure being made up of the $175,167.40 which St. Paul was entitled to draw from Chemical but which had not been paid to St. Paul and a total of $10,000 paid to Monen and another in connection with a loan from Merchants.

There is a strong contention on the part of Weaver Bros. that the item of $175,167.40 should not stand. It said:

> "[I]t represents *no true loss* on the part of St. Paul. The Court's award completely overlooks the fact that the funds in question were part of a *loan* from Chemical, that would ultimately have to be repaid. The final advance would satisfy a debt owing [Mullan] Contracting, and create a debt larger *pro tanto* with the construction lender. The 'damage' being fully offset by a 'credit' in another column of the hypothetical ledger, St. Paul has lost nothing. The Court's award is founded on an illusion and clearly should not stand." (emphasis theirs.)

The "building loan" agreement between St. Paul and Chemcial provided:

> "16. *Trust Fund.* Borrower covenants that Borrower will receive the advances to be made hereunder and to be secured by the Mortgage, and will hold the right to receive such advances as a trust fund to be applied first for the purpose of paying the cost of improvement and will apply the same first to the payment of the cost of the Improvement before using any part of the total of the same for any other purpose, except for payments specifically authorized in Schedule B."

The statement by Weaver Bros. relative to bookkeeping is correct, as far as it goes. One must look to the end of the line, however. Under the contract with Chemical the $175,167.40 item would have been payable to Mullan Contracting. As this case stands, Mullan Contracting as a use plaintiff is to be paid substantially in excess of that amount from any judgments recovered in this proceeding. Therefore, the indebtedness of St. Paul at the conclusion of this litigation will be $175,-167.40 greater if this amount is not allowed as an item of damage against Waver Bros. than if it is so allowed.

The trial judge's basis for charging this item to Weaver Bros. was summed up in his comment:

> "From my findings set forth immediately above, it is my conclusion that had Manufacturers been the construction mortgage lender as well as the permanent mortgage lender, the building would have been 'completed', and that such completion would have been certified by Cogswell and Neumayer, and that, therefore, there would have been no retainer. In any event, I find that Weaver's tortious conduct deprived Plaintiff of an opportunity to complete the building to the satisfaction of Manufacturers, who would otherwise have been the construction lender, and to draw down the full amount of the construction mortgage loan."

The trial judge correctly concluded that the items totaling $10,000 paid by St. Paul as finders' fees to procure the

Merchants loan was a proper item of damage allowable against Weaver Bros.

Since there was error in allowing punitive damages, the damages allowable under this count are $185,167.40 compensatory damages.

(iii) Third Count

Under this count the trial judge allowed as consequential damages $1,552,783.20, which is the amount of the deficiency decree obtained by Chemical in the amount of $1,297,952 plus accrued interest. On that subject he said:

> "B. *Alleged Consequential Damages.*
>
> "(a) *Chemical's deficiency decree.* The deficiency decree held by Chemical is part and parcel of the foreclosure proceedings which would not have been instituted had Manufacturers fulfilled its obligation under its letter of commitment and under the Buy-Sell Agreement — Plaintiff would not be saddled with this debt which, since February 23, 1967, has been bearing interest at 6% per annum. As was said in *Pennsylvania, etc., Casualty Insurance Co. v. Messenger (supra),* 'The Court should endeavor to place the injured person, so far as possible, by monetary award, in the position he would have been if the contract had been properly performed.' See also: *Wartenbe v. Car-Anth. Mfg. Co.,* 362 S.W. (2) (Mo.) 54, 56. To do that in this case it is necessary that I require Manufacturers to pay to Plaintiff such a sum as will enable it to liquidate its obligation under the deficiency decree."

We adopt that opinion.

On the remaining items the trial judge said:

> "(b) *Finder's Fee paid Manufacturers for extension.* Manufacturers was paid a finder's fee of $24,000 for extending the expiry date from September 7, 1965, to March 7, 1966. There is no causal relationship of any kind between Manufacturers' breach and the payment of this fee. It was not in any way a conse-

quence of that breach, and for that reason this claim is disallowed.

"(c) *Weaver's Finder's Fee of $9,600.* In order that Plaintiff might fulfill its obligations to the landowners under the land options, so that the land would not be lost, Weaver agreed to lend and Plaintiff agreed to borrow the sum of $480,000. This transaction took place on September 18, 1963. For placing the mortgage Weaver charged a finder's fee of $9,600. There is no causal relationship whatsoever between Manufacturers' breach and his expense, and it is, therefore, disallowed as an element of damage under this contract.

"(d) *Interest on the $480,000 mortgage.* When the Chemical construction mortgage loan was closed in New York on May 1, 1964, the mortgage in the amount of $480,000 was paid off, as was accrued interest in the amount of $18,160. This is disallowed as an element of damage, for the reasons just stated.

"(e) *Merchants' Finder's Fee.* As I have already stated, the $72,000 fee paid Merchants for the construction mortgage loan was exactly what Plaintiff would have had to pay Weaver and Manufacturers had the latter's offer been accepted. There is no evidence to support a claim for $2,500 attorneys' fee. The $10,000 paid Monen and another has already been allowed as an element of damage in the claim against Weaver. None of these expenses bear any causal relationship whatsoever to Manufacturers' breach, and for that reason these claims are disallowed.

"(f) *Dr. Merrill's $50,000.* When the land for the building site was purchased, Plaintiff agreed to pay Dr. Merrill the sum of $50,000 as 'moving costs' over and above the purchase price of his land. Once again, there is no causal relationship whatsoever between this claim and Manufacturers' breach, and, therefore, this claim is disallowed."

Except as to Dr. Merrill, we disagree.

The attorney's fee mentioned actually was $3,500. This was an oral opinion and the record is complex. Therefore, it is not surprising that there might be an error of $1,000 in the quotation of figures. The attorney's fee is fully set forth on the settlement sheet filed as an exhibit in this proceeding.

We note that Weaver Bros. said in submitting the original proposal to Manufacturers:

"CONSTRUCTION COSTS

"The attached Marshall and Stevens appraisal gives us a reproduction cost new of the subject building of $7,245,000. This appraisal service has proven extremely reliable in estimating construction costs on garden-type apartments as it takes into account all the myriad costs incidental to construction which become a part of final price. Some of these costs are as follows:

1. Contract extras — can add up to 10% of base contract.
2. Architect's fees — usually approximately 3% of base contract on a building of this size.
3. Engineering fees.
4. Financing charges.
5. Interest on construction loan.
6. Settlement charges.
7. Off-site utility charges.
8. Building permits.
9. Leasing and advertising expenses."

It has been determined that St. Paul had no equity in the building and that, therefore, the value of the building could not be recovered. In that case it then follows

that if St. Paul is to be placed "so far as possible, by monetary award, in the position [it] would have been if the contract had been properly performed", it must be permitted to recover those items which it has been obliged to pay out or for which it is liable that are connected with the erection of the building and which would in the normal course of circumstances have been paid from the loan from Manufacturers. The Manufacturers' loan was to be approximately $1,300,000 more than the contractor's construction cost. Had there been no breach, St. Paul not only would have had this fund from which to make payment, but it anticipated having a business in being to generate revenue for repayment of the loan which would have paid these items. Thus, portions of the construction costs paid by St. Paul or for which it still remains liable are part and parcel of St. Paul's loss directly chargeable to the breach by Manufacturers.

The trial judge correctly excluded the claim for the moving costs to be paid Dr. Merrill since that was not a part of construction. However, within the contemplation of the parties under the *Hadley v. Baxendale* rule would be the $24,000 extension fee paid Manufacturers, the $9,600 fee paid Weaver Bros. on its loan of $480,000, the $3,500 attorney fee previously mentioned, the balance due the architect said to be $108,000, the interest paid on the $480,000 mortgage, and the balance due Mullan Contracting and Real Estate Management Co., Inc., under the construction contract, said to have amounted to $270,627.41. Apparently, from the record this item is drawing interest from April 2, 1968. It would appear proper to allow interest from that date. In making computations allowance must be made for the item of $175,167.40 discussed under the second count which should be credited on the Mullan claim.

The original charge of Weaver Bros. was to be $48,000.00 for obtaining the permanent mortgage loan and $48,000.00 for obtaining the construction mortgage loan, a total of $96,000.00. When the contract with Weaver Bros. was rewritten in December of 1963 to eliminate the exclusive agreement with Weaver Bros. for obtention of the construction loan so as to permit St. Paul to obtain the con-

struction loan through Merchants, Weaver Bros. required that its compensation remain at $96,000.00, $48,000.00 which had already been paid and $48,000.00 to be paid later. St. Paul then agreed to pay, and did pay, Merchants $48,000.00 for the construction loan and was also obliged to pay Chemical a $24,000.00 fee, the same amount which Lamon of Manufacturers advised Tinley of Weaver in August, 1963, it would require as a fee for making a construction loan. It is the sum of these items to which Judge Proctor referred as "the $72,000 fee paid Merchants for the construction mortgage loan". This $72,000 also is a part of the damage sustained by St. Paul which should be allowed against Manufacturers.

The complexity of this case leads us to believe the wisest course of action would be to remand this case for entry of judgment on these items rather than attempting to compute them ourselves.

(iv) Fourth Count

There was no appeal relative to this count which was an action against Manufacturers in tort.

(v) Fifth Count

On this item the trial judge said:

> "This is a contract action against Weaver to recover the $48,000 paid by Plaintiff to Weaver on May 11, 1964, as a finder's fee for obtaining the permanent mortgage loan commitment from Manufacturers. I have already found against Weaver under this count. Accordingly, I will enter judgment under this count against Weaver Bros., Inc., in the amount of $48,000."

We adopt that opinion.

(vi) Sixth Count

This was the tort action against Weaver and Manufacturers. As the trial judge said, nothing new was added by this count and, therefore, he entered judgment under that

count in favor of the defendants. There was no appeal on this item.

Judgment as to punitive damages reversed: Judgments affirmed as to liability and case remanded for entry of judgments in accordance with this opinion, Appellees Weaver Bros. Inc. of Maryland and the Manufacturers Life Insurance Company to pay the costs.

In The
Court of Appeals of Maryland

No. 400
September Term, 1970

St. Paul at Chase Corporation, et al.

v.

The Manufacturers Life Insurance Company, et al.

MOTION FOR MODIFICATION OF DECISION AND FOR REHEARING

St. Paul at Chase Street Corporation and Charles W. Williams, Appellants and Cross Appellees, by David Freishtat, their attorney, move, pursuant to Maryland Rule 850, for modification of the decision rendered by the Court of Appeals on May 17, 1971 or for reargument of its appeal and, in support thereof, respectively shows:

Introduction

1. The Appeal of this case was argued before this Court on April 6, 1971.

2. On May 7, 1971, this Court rendered its decision in favor of the Appellant and Cross-Appellees and against

Manufacturers Life Insurance Company and Weaver Brothers, reversing in part, affirming in part and remanding for the entry of a judgment in conformity with its option.

3. Appellant seeks a modification or reargument upon the following grounds.

A. The Court erred in holding that "damages" as used in the Hadley v. Baxendale Rule means "elements" of damage and not the monetary value of these elements as determined by the parties as of the time they made their contract.

B. The Court erred in not allowing the $50,000.00 owed to Dr. George Morrell as damages since this sum was known by the Defendants to be part of the necessary costs of the project and remains unpaid as a result of Manufacturer's breach of contract.

ARGUMENT

A. *The Hadley Rule*

This Court, at pg. 39 of its opinion, in interpreting the Hadley v. Baxendale Rule stated that at the time of contracting, the parties would have contemplated the loss of the building in the event of a breach but not the value placed on the building. The Court is dividing the Hadley rule into two parts, each of which the Court states is to be separate and determined at different times and under different circumstances and conditions. The first part relates to the "elements" that go into a determination of loss which are to be determined within the parties' contemplation as of the time of contracting. The second part, according to the Court, relates to "values" assigned to those "elements" which the Court states is to be determined at some subsequent undetermined time, probably on the date of breach, independent of any agreed upon values assigned and relied upon by the parties.

Hadley states that:

". . . the *damages* which the other party ought to receive in respect of such breach of contract should be

> such as . . . arising naturally . . . or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it . . ."

"*Damages*" in the plural as used in the Hadley rule and as used in the cases and texts[1] is distinguishable from the singular of "damage."

Black's Law Dictionary (4th Edition) defines "damages":

> "A *pecuniary compensation* or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another." (Citations omitted) (emphasis supplied).

On the other hand, Black's Law Dictionary (4th Edition) defines "damage" (in singular form) as:

> "Loss, injury, or deterioration caused by the negligence, design, or accident of one person to another in respect of the latter's person or property. The word is to be distinguished from its plural — 'damages' — which means a compensation in money for a loss or damage."

Since Hadley and all of the cases citing Hadley, and all of the text's interpretation of Hadley, including Brantley

---

[1] For example see 25.C.J.S. Damages, Section 24a:

> "The *damages* which are within the contemplation of the parties are to be measured in terms of knowledge of the parties at the time of making the contract. Ordinary damage because of the breach of a contract is assumed as a matter of law to be within the contemplation of the parties. It is held that the parties will be presumed to have contemplated that the party injured by the breach of the contract would sustain such *damages* as would fairly and substantially, in the usual course of things, results from such breach, in the light of all the facts known or which should have been known to them; and the damages recoverable in and action for breach of contract are for this reason sometime more remote than those recoverable for a tort" (emphasis added) (p. 667).

on Contracts, used the plural form of "damage" (damages) in their explanation of the rule, "damages", as used in Hadley, must mean the dollar value of the element contracted for and dollar losses of the parties contemplated at the time of contracting in the event of a breach. These losses can only be measured in terms of the knowledge of the parties at time of contracting.

The dichotomization of "damages" under Hadley into "elements" determined as of time of contracting and "value" assigned to those elements on date of breach defeats the fundamental purpose for the rule. Hadley was formulated so that both parties to a contract can, as of the time of contracting, rather than at some subsequent, undetermined time, know what their exposures are under the contract and to be able to safely rely upon the then contemplated and agreed upon values in subsequent dealings. The practical effect of the Court's decision is to measure damages in a breach of contract situation as of the time of breach rather than as of the time of contracting which equates the contract rule with the rule in tort actions. To hold that the building is an element of damage determined at time of contracting without accepting the relied upon value the parties simultaneously placed upon that "element" is really theoretical, meaningless and has no practical application. After all, the dollars are what it is all about.

To accept "elements" of damage and ignore the "values" assigned to those elements in no way provides any security to the contracting parties. Such parties still have no way of knowing what their exposure or security under the contract ultimately will be. The "elements" are there but under the Court's ruling the "values" assigned to those elements await further determination under unforeseeable economic circumstances or other unforeseen conditions. The best example is the instant case. St. Paul and Chemical totally relied upon the value Manufacturers placed upon the building. To hold, as this Court has done, that one can no longer rely upon the values assigned to a project in negotiating a construction loan or in advancing addi-

tional monies for a project, will create total chaos in the volatile industry here involved, aside from being grossly unjust.

Under the Court's ruling, construction lenders and developers all over the country are placed in the position of incurring the exposure that a permanent lender will cancel its commitment and, through hired testimony, establish that there was no then existing market for the particular project regardless of what the parties believed at time of contracting and regardless of the degree of reliance the developer and construction lender placed on the values established for the project by the permanent lender. The permanent lender can minimize or avoid its losses while causing a developer to lose his project and the fruits of his bargain with the years of work going for naught and causing the construction lender to foreclose and end up owning and operating a building against its wishes.

Another tragic aspect of the present ruling is that the breaching party is placed in the unique position of determining the time the "value" will be assigned to the "element." The potential for inequity and fraud is overwhelming. Permanent and construction lenders all over the country, in times like today, when interest rates go up and down like a yoyo and money is available today but not tomorrow, desparately need a firm rule holding a permanent lender to the values the parties contemplated, agreed and relied upon at the time of the contracting. Consideration of the totally meaningless "elements" that the parties consider at contracting affords no practical protection to anyone other than the breaching party. By design, a party bent upon breaching a contract can scheme to breach at a moment it knows that the immediate value of the "element" is depressed regardless of the reliance upon the original values and the resulting injury to others.

The Court, at page 39, held:

> "The position of St. Paul is that because a *tentative* value of the building was assigned by Manufacturers

in making its loan that this becomes the criteria for determining damages.". (emphasis supplied.)

Manufacturers had not assigned a tentative[2] value on St. Paul's building. The value of St. Paul's real estate and the value of its project had been carefully determined by Manufacturers prior to giving their commitment. These values had been accepted by St. Paul and had been relied upon by St. Paul and by Chemical. An insurance company such as Manufacturers cannot make a mortgage commitment of 4.8 million dollars on a tentative value. Manufacturers testified that in giving their commitment they were restricted by Canadian regulations to lending 66% of the *value* of the property. To hold that the values placed by Manufacturers on St. Paul's property and on its project were merely tentative values, would be to hold that Manufacturers' commitment of 4.8 million dollars was merely a tentative commitment, to be accepted or rejected at their will when the building was complete.

It was the Court's belief that this value determined by Manufacturers was a "tentative" value that was pivotal in the Court finding that St. Paul had no equity in the building on the date of breach. Manufacturers loaned 66% of this "tentative" value *it placed* on the building or 4.8 million dollars. This 4.8 million dollars was the direct result of Manufacturers' "tentative" value and was subtracted by the Court from the Court determined fair market value of the building in determining that St. Paul had no equity.

St. Paul further maintains that this Court erred in adopting a "fair market value" as a basis for determining St.

---

[2] There is no evidence in this case to support this Court's determination that the $7,265,000 was a "tentative" value. Certainly neither Chemical nor St. Paul would have agreed to rely upon a tentative value as security for its loan. Nor would Manufacturers have been willing to make a permanent loan using the building as security if it believed the value was merely "tentative" and would not exceed the amount of its lien. Nor would Manufacturers have agreed to waive a higher interest rate in exchange for its 13.31% interest in the gross rents predicated on a "tentative" value.

Paul's equity. The value of the building on the day of breach, then empty only because of the breach, to a hypothetical buyer on a specific day, in no way represent its true value within the contemplation of St. Paul and Manufacturers since it was always known that the building would require about eighteen months before maximum occupancy could be expected.

Further, the fair market value assigned to the building by the defendants' appraisers and accepted by the lower court, ignores the intent of the parties formulated at time of contracting relating to the specialized use to be made of this "element." If it is the loss of the bricks and mortar only and not the value of its use that is contemplated by the parties at time of contracting, the value ultimately assigned to the building should be determined within the contemplated purposes of the parties for the building. The value the lower court assigned to the building was predicated upon a downgrading of the intended use of the building totally contrary to the intent of the parties. Gordon Gilbert was the only expert that determined the fair market value of the building on March 7, 1966 based upon the parties intended use. If fair market value is relevant, it is Gilbert's value of $7,245,339 that should control.

The Court has determined that St. Paul's equity on the date of breach is all to which it is entitled. That being so, the equity should be determined by using the "values" assigned to the "elements" by the parties at contracting based upon the uses then contemplated, or the difference between $7,265,000.00 and 4.8 million dollars, or the difference between Mr. Gilbert's fair market value of $7,245,-339 and 4.8 million dollars.

This Court, by its decision, has effectively removed as considerations in assessing damages against a wronging party the uses and purposes the parties contemplated and relied upon in their contract. It is respectfully submitted that this Court's decision represents one giant step backwards in the development of the law which should be

motivated to protect the innocent. Manufacturers chose to breach knowing what the effect upon St. Paul would be. But for the deficiency decree, which can be averted next time and nominal damages, Manufacturers comes out unscathed and St. Paul is obliterated.

We urge the Court to consider the practical effects of its decision. Cancellation of mortgage commitments by permanent lenders are rampant over the country. There is a significant national issue involved. This decision can only add "fuel to the fire" in encouraging permanent lenders to refuse roll-overs each time there is a significant change in the money market or to use a threat of refusal to roll over as the means to force a developer to renegotiate his loan on less favorable terms, as has become the custom. Further, the Court's decision results in the deprivation of private property without just compensation in violation of the due process requirement of the Fourteenth Amendment of the Constitution of the United States.

The Court's decision as it presently stands sanctions a wrong without a remedy for there can be no benefit to Charles W. Williams or St. Paul from the present award. We sincerely urge this Court to permit reargument on this most important question.

B. *Dr. Morrell and the $50,000.00*

The Court held at page 48 of its opinion that St. Paul can recover ". . . portions of the construction costs paid by St. Paul or for which it remains liable . . :" but disallowed the $50,000.00 owed to Dr. Morrell because ". . . that was not a part of construction . . ." (page 48). The $50,000.00 was always understood to be a necessary part of the project costs. In Plaintiff's Exhibit 24, E. 967, Jonhson's letter to Tinley, Johnson stated:

> "Attached is a list of the time payments required in connection with the acquisition of the properties (1101-1115 St. Paul St. and 100 E. Chase St.) which you requested by telephone today. This includes $675,-

000.00 for the land and $50,000.00 additional due one of the present owners for disrupting his practice and expenses of moving and reestablishing same."

This Court, at page 8 of its opinion, considered the total land costs to be $725,000.00, where it stated:

> "August, 1962: Williams contracted the first of nine purchase options on land on the north east corner of St. Paul and Chase Streets in Baltimore; total purchase price was to be $725,000.00; the options were to be exercised by June 15, 1963, with payment apparently to be made by September 1, 1963."

Weaver's $480,000.00 land loan was made so as to provide funds for Williams to make partial payment on the option to purchase the land. Weaver was repaid from the construction loan. The construction loan was originally intended by all parties to provide the funds for the acquisition of the land. It is respectfully submitted that any distinction between construction costs and project costs is academic. Williams could not purchase Dr. Morrell's land without agreeing to the payment of this $50,000.00. It was a necessary expense, known and accepted by all parties if the project was to proceed. It must be paid by St. Paul from any recovery it receives (assuming that any monies are available after payment to judgment creditors), was personally gauranteed by Williams and should be recoverable against Weaver and Manufacturers.

Respectfully submitted,

DAVID FREISHTAT,

Attorney for St. Paul and
Charles W. Williams.

In The

Court of Appeals of Maryland

No. 400

September Term, 1970

St. Paul at Chase Corporation, et al.

v.

Manufacturers Life Insurance Company, et al.

SUPPLEMENTAL MOTION FOR MODIFICATION OF DECISION AND FOR REHEARING

St. Paul at Chase Street Corporation and Charles W. Williams; Appellants and Cross Appellees, by David Frieshtat, their attorney, move, pursuant to Maryland Rule 850, for modification of the decision rendered by the Court of Appeals on May 17, 1971 or for reargument of its appeal and, in support thereof, respectfully shows:

Introduction

1. The Appeal of this case was argued before this Court on April 6, 1971.

2. On May 17, 1971 this Court rendered its decision in favor of the Appellant and Cross-Appellees and against Manufacturers Life Insurance Company and Weaver Brothers, reversing in part, affirming in part and remanding for the entry of a judgment in conformity with it opinion.

3. On May 25, 1971, St. Paul filed a Motion for Modification and Rehearing raising points "A" and "B" as contained therein which Motion was denied by this Court.

4. Appellant seeks a modification or reargument upon the following additional grounds.

C. The Court erred in reversing the trial Court's award of punitive damages of $100,000.00 under Count II of Plaintiffs' Declaration based upon its belief that Count II merely alleged negligence in the performance of a contract and therefore malice must be shown before such an award will lie.

D. The Court erred in not finding the inference of malice from Weaver Brothers uncontradicted actions justifying exemplary damages.

E. The Court erred in ruling that St. Paul had suffered no loss for the loss of its building.

C. This Court at page 32 of its opinion held:

> ". . . the first Count was a pure contract claim, while the second Count alleged negligence by Weaver Brothers in the performance of its contract with St. Paul."

This Court then held that punitive damages would not lie under Count II because punitive damages can only be awarded in a contract action where "actual malice" is shown or where the Court can draw the necessary inference of malice from the conduct of the offending party.

Count II is not an action for the negligent performance of a contract. *Count II is an action in deceit.* Following are various quotes from Count II establishing the true nature of this Count.

E. 21-22 (par. 46)

> ". . . the false statements made by the Defendant Weaver that Manufacturers had withdrawn their offer of a construction loan . . . were made by Defendant Weaver with the intent that the Plaintiffs rely on these false statements and were thereby fraudulent."

E. 26 (par. 55)

> "The Plaintiffs further allege that Defendant Weaver having secured the Plaintiffs' complete confidence,

knowing the position in which the Plaintiffs stood and the heavy losses faced by the Plaintiffs, evidenced a complete indifference to the Plaintiffs' safety and welfare, evidenced a complete absence of even slight care or diligence, and further evidenced a thoughtless and reckless disregard of the Plaintiffs' interests."

E. 26 (par. 56)

"As a result of Defendant Weaver's deliberate, willful, unjustifiable, unwarranted and wrongful acts and negligence, the start and hence completion of the Plaintiffs' project was delayed by many months. The Plaintiffs allege that these deliberate, willful, unwarranted, and wrongful acts and negligence on the part of Weaver contributed to and set in motion those causes which caused the Plaintiffs their heavy losses and damages including the loss of their entire project and in addition, were then left heavily indebted to Chemical Bank and others.

E. 26 (par. 57)

"In addition, the Plaintiffs allege that when all of the actions of Defendant Weaver as set out above are taken together, these actions show constructive fraud on the part of Defendant Weaver. Accordingly, the Plaintiffs allege that this fraud contributed to and set in motion those causes which caused the Plaintiffs their heavy losses and damages and that Defendant Weaver is responsible for the Plaintiffs' heavy damages and losses."

St. Paul has alleged in Count II all of the essential elements constituting actionable fraud i.e., a false representation see E. 21; falsity of the representation was known to the Defendant see E. 26; that the misrepresentation was directed toward the Plaintiffs see E. 22; reliance by the Plaintiff on the misrepresentation see E. 22; and damage suffered as a result of the misrepresentation see E. 26.

The question of fraud is one of fact to be determined by the jury or by the Court sitting as the trier of facts. *Walsh*

v. Edwards, 1964, 197 A. 2d 424, 233 Md. 552; See also 11 M.L.E. Fraud, Section 24 and cases cited in Note 31.

Following are the findings of fact and the statements contained in the opinion of the trial Court dealing with the conduct of Weaver which the Court felt sufficient justification for the imposition of exemplary damages.

E. Page	*Reference*
104	Weaver's breach of duty willful, material.
109	Weaver knowingly made a misstatement of fact concerning Manufacturers construction loan offer. This was a clear breach of duty.
109	At the very end it was all for Manufacturers — nothing for St. Paul.
110	Series of acts prove Weaver did not act as it should toward St. Paul citing Gottschalk and Grant episode and exacting of letters from Newmeyer and Cogswell.
110	If Weaver had spoken up, Manufacturers may not have cancelled.
118-119	At the end everything was for Manufacturers, nothing for Plaintiffs.
121	Conscious and deliberate breach of duty should, in an appropriate case, carry with it something more than the obligation to pay actual damages.
122	Weaver's actions were wanton, characterized by extreme recklessness and utter disregard for the rights of others — in this case St. Paul.
123	Weaver breached duty it owed to St. Paul by negligent conduct; not merely a failure to disclose but knowing misstatement.
124	Court has found Weaver owed a duty of good faith to Plaintiffs and Weaver breached this obligation by knowingly making a misstatement of facts.

E. Page Reference

125 Court's opinion is that if Tinley had communicated Plaintiffs acceptance of Manufacturers offer of construction loan to Manufacturers, Manufacturers would have issued letter of commitment promptly and that settlement would have been earlier than May 1, 1964 and that everything would have been moved back at least two months.

126 Had Weaver communicated St. Paul acceptance it would have been altogether different ball game.

127 Weavers conduct not only "wanton", but also may have involved an element of fraud citing *Parish v. Milk Producers Assoc.*, 250 Md. 24; *Levin v. Singer*, 227 Md. 47.

Punitive damages can lie in an action for deceit particularly where the wrong involved some violation of duty springing from a relation of trust and confidence or in the breach of duty where one is in a fiduciary capacity as the trial Court found in the instant case or where fraud is gross or where there is malice and willfulness. See *Fowler v. Benton*, 1967, 226 A. 2d 556, 245 Md. 540.

Under the *Fowler* case, the trial Court, within its discretion, was justified in imposing punitive damages against Weaver Brothers because of the trial Court's finding that the wrongs committed by Weaver Brothers in fact sprang from a relation of trust and confidence and did in fact involve a breach of fiduciary duty and did in fact consider the actions of Weaver Brothers to be grossly fraudulent to the point where the trial Court found that the gross, reckless and wanton conduct of Tinley, the Executive Vice-President of Weaver Brothers, justified the trial Court, as the trier of fact, to infer from such conduct an inference of malice and award punitive damages.

D. Count I was the contract Count. Count II alleged all of the essential elements of actionable fraud. However, arguendo, Weaver's conduct was such as would compel an inference of malice regardless of how this Court characterizes Count II.

The Court has equated Weaver's conduct in the instant case with the conduct of the Defendant in the *Knickerbocker v. Gardiner Co.*, 107 Md. 556 case which did not involve fraud and held that the conduct of Tinley was "but little different from the conduct in Knickerbocker" page 35 of the Court's Opinion.

As a factual proposition, we respectfully submit that the Court erred in equating Tinley's conduct to that of the Defendant in the *Knickerbocker* case. Tinley's wrongful actions were far more prolific, more egregious and foreseeably had a far more disastrous effect upon the Plaintiff then did the actions of the Defendant in the *Knickerbocker* case. In *Knickerbocker*, the Defendant's actions were done with an intent to benefit itself though knowing that his actions would result in injury to the Plaintiff but were not fraudulent and as of a scheming nature as was Weaver's conduct.

In St. Paul, Tinley, who was in a fiduciary capacity to St. Paul, embarked upon a series of wrongful acts over an extended period of time which, among others included fraud by specific misrepresentation and fraud by omission. Tinley's actions were done with the full knowledge of the enormous injury that would be inflicted on St. Paul. The trial Court refused to find, as urged by St. Paul, that Weaver's actions through Tinley were motivated by a desire to benefit itself rather than actions which were specifically intended to injure St. Paul. St. Paul argued that Tinley was scheming to take over the building. The trial Court rejected this contention as has this Court by adopting the trial Court's opinion. If Tinley was not scheming to take over the building, then there was no justification for any of the below described actions taken by Tinley. Without personal motivation for financial gain, Tinley's actions can only be viewed as acts done with a specific intent to injure St. Paul.[1]

---

[1] However, St. Paul maintains that the better rule for determining whether or not exemplary damages should be awarded is the rule adopted by the trial Court through its reliance upon *Brown v. Coates*, 253 F. 2d 36. The scheming for personal gain by one in

/This Court has relied to almost an unprecedented degree upon the comprehensive and painstaking factual analysis of the Trial Court. Judge Proctor analyzed Tinley's actions and repeatedly, in his Findings of Fact, Opinion on Liability and Opinion on Damages found that Tinley acted in a grossly reckless and wanton manner which mounts up to fraud.

A listing of some of Tinley's wrongful actions follow:

1. On October 10, 1963, Williams told Tinley he accepted Manufacturers offer of a construction loan. Tinley told Williams the offer had been withdrawn when in fact it was then available and remained available through May 1, 1964 (E. 40). The loan was available even when Weaver coerced St. Paul to sign Defendant's Exhibit 9, E. 988, the letter agreement of December 6, 1963 where St. Paul agreed to pay Tinley $96,000.00 even though Tinley could not get the construction loan just to obtain Weaver's permission for Merchant's Mortgage Company to obtain the loan. This is in spite of Judge Proctor's find-

---

a fiduciary capacity to the substantial detriment of another who is relying upon the breaching parties' good faith, should be punishable by the imposition of exemplary damages. It is incongruous to hold that the intent to benefit oneself creates a shield against punitive damages regardless of the degree of fraud, reckless and wanton conduct involved and regardless of the degree of injury inflicted. Where conduct is gross, reckless, wanton and/or involves elements of fraud and such conduct substantially injures another, punitive damages should be imposed whether or not the tortious actions had its beginnings couched in the terms of a contract. We respectfully submit that any distinction between gross, reckless and wanton conduct stemming from the performance of a contract from similar conduct occurring independent of a contract, does violence to the basic principles of justice and fair play. The effect upon the Plaintiff in either case is the same. Now Chief Justice Burger recognized in *Brown v. Coates* many courts have refused to award punitive damages in any contract action. However, the Court held that the better view permitted such damages where the breach of contract merges with and assumes the character of a wilful tort, calculated, flagrant and in disregard of obligations of trust. 5 Corbin, Contracts, Sec. 367; McCormick, Damages, Sec. 290; 70 Harv. L. Rev. 517, 532.

ings that Tinley had given St. Paul assurances that it could obtain the construction loan (E. 54).

2. After denying the existence of Manufacturers offer of a construction loan, Tinley attempted to interest Williams in selling his project to Gottschalk and Grant. Williams refused and terminated these discussions (E. 65-66). Tinley without any authority from Williams, attempted to force a situation where Williams would be forced to sell. Tinley contacted Mullen and told Mullen that Gottschalk and Grant were taking over the building (E. 66). He then called Newmeyer and told Newmeyer that Williams was washed up and that Gottschalk and Grant were taking over the project (E. 66). It must be remembered that Tinley had the offer of a construction loan in his pocket all the time.

3. Tinley agreed to lend St. Paul $500,000.00 as a cushion to insure completion if Mullen would obtain the construction loan for 4.8 million dollars (E. 61). Mullen obtained approval of Maryland National Bank if Weaver's $500,000.00 was available (E. 64-65). On October 10, 1963, Tinley denied having made the offer of $500,000.00 and Mullen withdrew his application (E. 65). Both Williams and Mullen confirmed Tinley's offer.

4. On March 17, 1964, Tinley told Williams he should falsify his records so as to inflate the construction costs for the project by giving Mullen St. Paul's stock; that this would facilitate Manufacturers approval of the plans and specifications (E. 74-76). These happenings were confirmed by Johnson. Tinley again repeated his unique suggestion on April 8, 1964 (E. 76). See also E. 62 for additional confirmation of Tinley's fraudulent suggestion to inflate the costs of construction.

5. On March, 1966 Weaver hired on behalf of Manufacturers, a professional photographer to take pictures of only the unfinished work. He was accompanied by representative of Weaver Brothers (E. 92).

6. On March 11, 1966, Weaver knowing that the building was fully complete as the Court has found, indicated

that the cancellation was because the building was not complete; there was nothing he could do; he would not even try; and Weaver asked for his additional $48,000.00 (E. 94).

7. On March 29 and March 30, Weaver caused Cogswell and Newmeyer to come to their offices in order to solicit from them letters which would support Manufacturers decision for cancellation. (Defendant's Exhibit FF, Defendant's Exhibit N). Both Cogswell and Newmeyer testified that they were asked a specific question by Mrs. Byrnes of Weaver Brothers as to whether or not the building was 100% complete. Mr. Newmeyer testified that Mrs. Byrnes said that was not what she asked. She wanted to know whether the building was 100% complete. To this question, Newmeyer and Cogswell wrote their letters which Manfuacturers so heavily relied upon at trial.

There are other wrongful actions committed by Weaver which support St. Paul's contention that this Court erred in reversing the trial Court's finding that Weaver's actions, under the atmosphere and circumstances developed at the trial, demanded the imposition of sanctions. In view of the heavy and justifiable reliance this Court has placed upon the trial Court's Findings of Fact it is respectfully submitted that the Trial Court's belief that Weaver's actions required the imposition of sanctions should be respected.

E. *Compensatory Damages*

The Trial Court having listened to all of the testimony, having reviewed all of the evidence, and having heard the arguments of Manufacturers, rejected Manufacturers' contention that the contract between Manufacturers and St. Paul was a contract to loan money. As stated by the Trial Court at E. 131:

> "In the first place this was a great deal more than a contract merely to make a loan, if in fact it was such a contract at all."

This Court at page 37 of its Opinion overruled the Trial Court on this point and held; "this was a contract to lend money."

Whether the subject contract was one to lend money or not is immaterial. It provided for duties and rights on both sides with something to be done on each side. As stated in 5 M.L.E. Contracts, Section 1:

> "The law recognizes, as a matter of classification, two kinds of contracts, bilateral and unilateral. Every bilateral contract includes both rights and duties on each side, while both sides remain executory. A unilateral contract, on the other hand, is one in which there is a promise on one side only, the consideration on the other side being executed."

As stated in 17 C.J.S. Contracts, Section 8:

> "A 'bilateral contract' is one of reciprocal promises, resulting in something to be done or foreborne on each side."
>
> "A 'unilateral contract' is one consisting of a promise on one side only and executed consideration on the other side."

Under the above definitions, the subject contract was a bilateral executory contract with duties and obligations on both St. Paul and Manufacturers. For a breach of its contract, the damages assessed against Manufacturers must be determined under the rules laid down for breach of contracts in general. These rules stem from the celebrated case of *Hadley v. Baxendale*, 1854, 9 Exch. 341, (Eng.). The *Hadley* case has been adopted as part of the Law of Maryland and has been universally accepted.

This Court as well as St. Paul and Manufacturers, recognized that the rules laid down by Baron Alderson in the *Hadley* case should govern the subject case. Simply stated, the *Hadley* rule is that in breach of contract actions the damages which the injured party should receive are those damages which the parties contemplated at the time the contract was made, that would result from a breach of

contract. The Court at page 39 of its Opinion, however, ruled that St. Paul misunderstood the *Hadley* rule and held that the loss of the building would have been in the contemplation of the parties at the time the contract was entered into, but not the values of the building as agreed to by the parties and that the amount of the loss should be established at the time of the breach.

In its "Motion for Modification of Decision and for Rehearing", filed May 25, 1971, which Motion was denied June 1, 1971, St. Paul had argued that under the *Hadley* rule, that which was in the contemplation of the parties at the time the contract was entered into could not be split into two elements; (1) the loss of the building and, (2) the value of the building. St. Paul will not impose on the Court and attempt to reargue its position here, but will merely respectfully request the Court to reconsider its position as a part of this Supplementary Motion.

In this Motion St. Paul will direct its arguments and request for a Rehearing to the following ruling of this Court (also at page 39 of its Opinion).

> "Judge Proctor was entirely correct in determining that the loss was the equity, if any, in the building. There was no equity. Therefore, he was correct in allowing nothing for the loss of the building".

In reaching this decision, the Court relied heavily on the 1924 Texas case of *Collins Insurance Co. v. Sallas*, 260 S.W. 261. It is respectfully submitted that this case bears no similarity to the case at bar. Firstly, the *Collins* case was a unilateral contract to loan money. There was no duties to be performed by each of the parties. Secondly, prior to negotiating a loan, Sallas had made a downpayment of $1,000.00 on a piece of land priced at $20,000.00 on which he desired to build a home. Sallas had not relied on the loan from Collins and had not started construction of his home. When Collins reneged, Sallas was unable to obtain another loan and his deposit was forfeit. Sallas' only loss was his $1,000.00 deposit. This was all he sued to recover. The Court found that this $1,000.00 was the

amount of Sallas' equity, and awarded him the damages of $1,000.00 requested by him.

In the case at bar, St. Paul had not incurred any obligation and had made no payments on its land or building before Manufacturers' offer was made. St. Paul relied on Manufacturers' contract, met all of the conditions imposed by Manufacturers, borrowed $4,800,000.00 from Chemical, and invested this amount together with substantial other sums in their project. The statement of the Court in *Collins* cannot be held to govern the subject case or to modify the general *Hadley* rule. While the Court in *Collins* did not cite *Hadley*, it recognized the Hadley rule and held that what was in the contemplation of the parties at the time they entered into their contract should govern the damages to be awarded. The *Collins* case, therefore, cannot be used to modify or in any manner change the *Hadley* rule.

During the trial of the subject case, Judge Proctor determined that the value of St. Paul's building as of the date of Manufacturers' breach was $4,509,785.00. The Court affirmed this finding. While St. Paul does not agree with this value, or the speculative methods used by the Trial Court in arriving at this figure, nevertheless, under Judge Proctor's findings, this was the value of the building as of the date of the breach. St. Paul, therefore, should have been awarded at least this amount for the loss of their building even though the parties at the time the contract was entered into had valued the building at $7,920,000.00.

It is respectfully submitted that there was no justification whatever for deducting the amount of the mortgage from this value to determine St. Paul's equity. In the first place, equity has nothing to do with the damages St. Paul is entitled to recover. At the time the contract was made, neither of the parties contemplated that the bricks and mortar value of the building would pay off and redeem the mortgage. Bricks and mortar can pay off nothing. The parties contemplated that the use of the building which Manufacturers had valued at $7,265,000.00, would pay off and redeem the building. If equity has any part to pay

in the damages in the subject case (which St. Paul denies), the only equity that could be used and the only equity that was brought out by the testimony and evidence submitted at the trial of this case, would be St. Paul's equity in its use of the building, namely $7,265,000.00, less the amount of the mortgage, or $2,465,000.00 which was the amount St. Paul had demanded as Special Damages.

Neither the Trial Court nor this Court in awarding damages considered St. Paul's use of the building. Manufacturers' breach prevented St. Paul from using their building as they intended to do for a downtown home for wealthy persons, and as was contemplated by the parties at the time the contract was entered into. Manufacturers cannot take advantage of the wrong committed by them and say that St. Paul would not have been able to carry and redeem the mortgage from its use of the building. Williams had testified that he had arranged ample funds to carry the building through the "lead period", until it would be self-supporting. This statement was uncontradicted. While the Trial Court held that St. Paul's property was worth only $4,509,785.00, at the date of the breach, by the use of the Court's own figures, as shown by St. Paul in its brief at pages 97, 98, St. Paul would have been able to meet its mortgage payments in full, with $52,283.89 remaining as a return to St. Paul.

Neither the Trial Court nor this Court in awarding damages considered the value of St. Paul's use of its building. As stated above, the only value for the use of the building that was submitted in evidence was the value that Manufacturers had placed on it of $7,265,000.00 from which should be deducted the amount of the mortgage, leaving a net value of $2,465,000.00.

For the above reasons, St. Paul respectfully submits that as damages, it should be awarded at the very least, the value of the building as determined by the Trial Court, namely, $4,509,785.00 plus the net value of the use of the building as established by Manufacturers, namely $2,465,000.00. For this reason St. Paul has requested in this Supplementary Motion the right to reargue these points.

On page 47 of its Opinion, the Court stated:

> "If St. Paul is to be placed 'so far as possible, by monetary award, in the position (it) would have been if the contract had been properly performed', it must be permitted to recover those items which it has been obliged to pay out or for which it is liable that are connected with the erection of the building and which would in the normal course of circumstances have been paid from the loan from Manufacturers".

It is respectfully submitted that if St. Paul and Williams, who is a Party Plaintiff, are to be "put back in the position by monetary award, in the position (it) would have been had the contract been properly performed", St. Paul and Williams must be awarded at the very least, the value of the building, determined by the Court, namely, $4,509,785.00 plus the net value of its use, namely, $2,465,000.00, as established by Manufacturers. Only in this way can St. Paul and Williams be reimbursed for the enormous amount of time, effort, and monies expended in developing the project, putting it together, in supervising the construction of the building, in advertising, in furnishing model apartments, and in staffing the building, and having it open and ready for occupancy. All of this, as well as the loss of the building and loss of its use were lost as a result of Manufacturers' callous, deliberate and wanton breach.

The amount of the monies awarded by this Court will not even pay off all corporate obligations with interest, and will leave nothing for St. Paul and Williams. It is further submitted that in equity St. Paul's legal expenses and fees must be paid before St. Paul's creditors are paid for, except for the time, effort, and expense of St. Paul's attorneys, its creditors would have received nothing.

Respectfully submitted,

DAVID FREISHTAT,

Attorney for Appellants.

In The

Court of Appeals of Maryland

Case No. 400

Fall Term, 1970

St. Paul at Chase Corporation, et al.

v.

Manufacturers Life Insurance Company of Toronto, et al.

MOTION TO STAY ISSUANCE OF MANDATE PENDING REVIEW BY THE SUPREME COURT OF THE UNITED STATES

St. Paul at Chase Corporation and Charles W. Williams, Appellants, by David Freishtat, their attorney, moves, pursuant to Maryland Rule 876b that the issuance of the mandate herein be stayed pending application for review of the judgment of this Court by the Supreme Court of the United States. The grounds of the motion are as follows:

1. Appellants intend to file a timely petition for certiorari in the Supreme Court of the United States.

2. The petition will present the following federal and constitutional questions, which, for the reasons set forth after each question, are sufficiently important and debatable as to raise a reasonable prospect that at least four members of the Supreme Court would vote to review the case.

a. In view of the acceptance in nearly all of the States of the United States of the Rule of *Hadley v. Baxendale*, 1854, 9 Exch. 341 (Eng.), for measuring damages arising out of a breach of contract, a decision of a State Court holding that the values determined by the contracting parties at the time of contracting are merely "tenative

values" and are not binding on a mortgagee, and that the damages to which the injured party is entitled are to be determined under conditions existing on date of breach, different from those values which formed the basis of the contract, will create such chaos and uncertainty in the Mortgage Financing Industry, that it presents an issue of over-riding importance to the general public, and as such constitutes a Federal question.

This ruling would permit a permanent mortgagee to take a second look at its commitment after a developer and construction lender had spent huge sums in the development and completion of a project and to cancel its commitment if it felt it was to its advantage to do so. In time of economic distress and fluctuating interest rates, this ruling would allow the permanent mortgagee to breach its contract with impunity.

The Federal Government today is doing all in its power to encourage building so as to stimulate the economy of the country and provide needed housing for persons of low incomes. Such developments can only be created by construction loans against permanent mortgage financing. Only in reliance on a permanent mortgage commitment can developers and construction loan lenders advance the huge sums needed for such developments. If under the ruling of this court developers and construction loan lenders realize they cannot rely on the face value of the commitment of a permanent mortgage and the permanent mortgagee may vary or cancel its commitment with impunity when work on the development has been completed, no developer or construction loan lender can advance the huge sums needed with any security. This ruling would have an exceedingly detrimental effect on the national economy.

b. May a wrongdoer or a Court force an injured party to accept a "fair market value" for his property where the injured party had no desire to sell his property and does not this amount of taking of property without due process of law in violation of Article Fourteen of the Constitution of the United States?

During the trial of the subject case, the Trial Court having ruled that Manufacturers had breached its contract with St. Paul and was responsible to St. Paul for the loss of its building, then disregarded the values of the building and its use that had been established by Manufacturers prior to the contract being entered into and which values formed the essence of the contract between St. Paul and Manufacturers, and determined that the only damages St. Paul was entitled to for the loss of its property was the value of its equity in that property as of the date of the breach. To determine this equity, the Trial Court established a "fair market value" as of the date of the breach. As this "fair market value" was less than the mortgage, the Trial Court ruled that St. Paul had no equity in the property, had suffered no loss, and was not entitled to recover any damages for the loss of its building. This Court affirmed the above rules.

It is submitted that in forcing St. Paul to accept this arbitrarily established equity based on arbitrarily established "fair market value" as a measure of its damages constituted a taking of property without due process of law.

3. If the mandate issues and the judgment of this Court is executed, Appellant will be irreparably injured. The judgments awarded by the Court, not only are not sufficient to enable the Appellants to pay all of their obligations that were incurred in reliance on their contract with Manufacturers, but leaves *nothing* for the Appellants to repay them for the loss of their property, and nothing to pay them for the time and monies invested in the project by them.

4. The balance of equities favors the relief requested.

St. Paul and Williams spent three years in developing the need for their specialized building, as covered in their feasibilty report, in developing the plans and specifications for this building and in acquiring the land necessary for the project. Manufacturers fully approved the purpose for which this building was developed, and the plans and specifications of it. St. Paul and Williams then spent another three years in arranging the financing of the building, in

supervising the construction of it, in advertising the project, in furnishing model apartments, and in staffing the building and having it ready for occupancy. This represented a sizeable investment in terms of time, effort, and money. Having put their package together, St. Paul and Williams then borrowed $4,800,000 from Chemical and invested this entire amount, plus other considerable monies in the project. It was brought out at the trial of this case by the trier of facts that St. Paul's investment in the project amounted to approximately $5,100,000.

Manufacturers knew that St. Paul and Williams, in reliance on the contract, had spent huge sums. Manufacturers knew that St. Paul and Williams would be completely wiped out should Manufacturers cancel their commitment. This did not deter Manufacturers. As so succiently stated by the Trial Court at p. E. 114:

> "I am persuaded beyond any doubt that the reason for the cancellation of this contract was, first, a calculated risk taken by Manufacturers that if it didn't accept the roll over, and if the construction mortgage were foreclosed, and if Manufacturers were sued, that it could weather the storm, either by avoiding liability completely, or if subjected to liability, by minimizing damages. They took that calculated risk, and they're stuck with the result".

St. Paul has asked for Direct Damages of $7,920,000. They have asked for Special Damages of $2,465,000. The total of these Compensatory Damages amounts to $10,385,000, a very sizeable sum. Is it against equity for the Court to award this amount of money to St. Paul when it has been shown that St. Paul had invested only $5,100,000? In this connection the Court has repeatedly held that parties enter into a contract with the object of making a profit. The Court has also held that it is not for the Court to determine that a contract was a good or bad bargain and the terms of it may not either be changed to favor either party. However, is it equitable to request an award of $10,385,000, where only $5,100,000 had been invested in the project? In

spite of the legal rights of the injured party to recover the full amount contract for, let us look at the equity of such a demand.

Today, any return must be weighed in the light of taxes. After taxes this award would amount to only $7,788,750. Is this too high a return on an investment of $5,100,000? However, this amount would have to be further reduced by the expenses of this litigation, and by the obligations with which St. Paul was left, which without interest, amount to over $2,045,000. Deducting this $2,045,000 from the net of $7,788,750 without any allowance for legal expenses or any allowance for the monies spent by Williams in putting the package together, or in supervising the construction and the monies advanced by them to have St. Paul open and ready for business on March 7, 1966, the date of the breach, leaves only $5,740,750 as a return on the $5,100,000, invested in the project. It could hardly be held that Williams and St. Paul were demanding a "windfall". Not including development, supervisory and operating expenses, and not including legal expenses, St. Paul would receive a net of only $5,740,000 to repay them for their investment of $5,100,000.

As the judgment now stands, St. Paul will have been awarded a total of approximately $2,250,000 including interest, which is not sufficient even to pay all of St. Paul's corporate obligations after providing for St. Paul's legal expenses. It is submitted that without these legal expenses, St. Paul would have recovered nothing for their creditors, and therefore these legal expenses must be paid before the creditors. As the judgment now stands, St. Paul recovers nothing for itself and nothing to reimburse Williams for the enormous amount of time, effort, and monies expended by him.

In demanding $10,385,000 from Manufacturers, St. Paul was not requesting that Manufacturers guarantee the success of their venture. St. Paul and Williams were merely requesting that Manufacturers pay to them the values that formed the basis of their contract with Manufacturers and

that were lost as a result of Manufacturers' breach. Manufacturers must be held liable for these values which they themselves established.

As a result of Manufacturers' breach, St. Paul was wiped out and all of the time, monies, and efforts spent by Williams were also wiped out. Also as a result of Manufacturers' breach, Manufacturers has had the use of the monies wrongfully withheld by them for a period of over five years, during a period when interest rates reached 10% or more.

The above clearly shows that the equities in this case demand that St. Paul be awarded as damages the value of its building and the value of its use that was in the contemplation of all of the parties at the time this contract was entered into and which Manufacturers should have realized St. Paul would lose should they (Manufacturers) breach their contract.

DAVID FREISHTAT,

Attorney for Appellants.

June 2, 1971

David Freishtat, Esq.
Attorney at Law
17th Floor, Tower Building
Baltimore, Maryland 21202

Dear Mr. Freishtat:

The Court has considered your motion, filed on May 26, 1971, for modification of decision and for rehearing in the case of *St. Paul at Chase Corporation, et al. v. The Manufacturers Life Insurance Company, et al.*, No. 400, September Term, 1970, and, for your information, said motion was denied on June 1st.

We are, however, enclosing a rewritten page 48 for substitution in your copy of the opinion previously filed

on May 17, 1971, and you will note that the Court has made an addition thereon at line 13.

Very truly yours,

J. LLOYD YOUNG,
Clerk.

ORDER

Upon consideration of the motion to stay issuance of mandate pending review by the Supreme Court of the United States in the above entitled case, it is this 24th day of June, 1971

ORDERED by the Court of Appeals of Maryland that the mandate be, and it is hereby, stayed pending application for review of the decision of this Court to the Supreme Court of the United States, and until final decision by that Court, unless otherwise ordered by this Court or by the Supreme Court of the United States, provided such application for review be timely filed.

/s/ HALL HAMMOND,
Chief Judge.

June 25, 1971

David Freishtat, Esq.
Attorney at Law
1700 Tower Building
Baltimore, Maryland 21202

Dear Mr. Freishtat:

The Court has considered your supplemental motion for modification and for rehearing, filed June 14, 1971, in the case of *St. Paul at Chase Corporation, et al. v. Manufacturers Life Insurance Company et al.*, No. 400, September Term, 1970, and, for your information, said motion was denied on June 24th.

A copy of an Order of Court filed on June 24th in the same appeal, which is self-explanatory, is enclosed.

The motion for reargument of Manufacturers Life Insurance Company, filed on June 15th, was also denied on June 24th.

The motion for reargument of Weaver Bros. Inc. of Maryland, filed on June 16th, was denied June 24th.

Very truly yours,

J. LLOYD YOUNG,
Clerk.

Supreme Court, U.S.
FILED
AUG 4 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ----71-167

ST. PAUL AT CHASE CORPORATION,
A MARYLAND CORPORATION,
Petitioner,

v.

MANUFACTURERS LIFE INSURANCE COMPANY OF TORONTO, A CANADIAN CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

W. HAMILTON WHITEFORD,
Sun Life Building,
Baltimore, Maryland 21201,
Counsel for Petitioner.

Of Counsel
DAVID FREISHTAT
Tower Building,
Baltimore, Maryland.

The Daily Record Co., Baltimore, Md. 21203



Table of Contents

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	2, 3
Statutes Involved	3
Statement	4
Reasons for Granting the Writ	6
Conclusion	14
Appendix (Under Separate Cover):	
Opinion and Judgment Below filed May 17, 1971	1a
Motion for Rehearing filed May 25, 1971	58a
Supplemental Motion for Rehearing filed June 14, 1971	67a
Motion for Stay of Mandate filed June 14, 1971	81a
Orders of Court Below on above Motions	86a

Table of Authorities

Case

Hadley v. Baxendale, 9 Exch. 341 (Eng. 1854)	4, 5, 8, 10

Statutes

Constitution of the United States:	
Fourteenth Amendment	3, 11
Constitution of Maryland:	
Article 23, Bill of Rights	3, 11

Miscellaneous

Black's Law Dictionary (4th Edition)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ------

ST. PAUL AT CHASE CORPORATION,
A MARYLAND CORPORATION,
Petitioner,

v.

MANUFACTURERS LIFE INSURANCE COMPANY OF TORONTO, A CANADIAN CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

St. Paul at Chase Corporation prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland, entered in the above entitled case on May 17, 1971.[1]

[1] The subject case in the court below is entitled St. Paul at Chase Corporation and Charles W. Williams, Appellants and Cross Appellees v. Manufacturers Life Insurance Company of Toronto and Weaver Brothers, Inc. of Maryland, Appellees and Cross Appellants.

CITATIONS TO OPINIONS BELOW

The complete record of the subject case is submitted herewith. While the opinion of the Court of Appeals of Maryland is reported in 278 A. 2d 12 (1971), for the convenience of the Court, it is printed in the Appendix filed under separate cover. Likewise your Petitioner's Motions for a rehearing filed May 25, 1971, and again June 14, 1971, which were denied, together with Motion to Stay Mandate also filed June 14, 1971, which was granted, are printed in the Appendix pps. 57a, 67a, 81a, respectively. The orders of the court below relative to the above Motions are printed in the Appendix, p. 86a.

JURISDICTION

The judgment of the Court of Appeals of Maryland was filed May 17, 1971. On June 1, and again on June 25, rehearing was denied. On June 24, an order was issued staying the mandate pending the filing of a Petition to this Court, and a final determination of the issues involved. The jurisdiction of this Court is invoked under 28 U.S.C., *Sec. 1254*, and under the provisions of Rule 23.

QUESTIONS PRESENTED

1. Is not a decision of a State Court that would adversely affect the flow of capital into the development and construction industry a matter of such national importance that it is deserving of the attention of this Court?

2. In the context of the mortgage financing and construction industries, where a proposed permanent mortgagee has breached its contract and refused to go forward with its commitment to advance the mortgage money after the developer, in reliance on the commitment, has spent huge sums and completed the project, are damages to be measured by:

a) establishing a "fair market value" of the building as of the date of the breach, based on adverse transitory economic conditions existing at that time which were not foreseeable at the date of contracting and then by using the "fair market value" so established and deducting the amount of the proposed mortgage thus calculating the developer's resultant equity, or lack of it, in the project?

Or as urged by Petitioner are damages to be measured by:

b) the values that formed the basis of the contract at the time the contract was made?

3. In a breach of contract action, does not an imposed "fair market value" as of the date of the breach, different from the values that had been agreed to by the contracting parties at time of contracting, amount to a taking of property without due process of law in violation of the 14th Amendment of the Constitution of the United States and of Art. 23 of the Bill of Rights of the Constitution of Maryland, especially where the "fair market value" assigned to the project as of date of breach is based upon economic conditions and circumstances that were not contemplated or foreseeable at the time the contract was made?

STATUTES INVOLVED

The statutory provisions involved are the 14th Amendment of the Constitution of the United States, Sec. 1, which states that: ". . . nor shall any State deprive any person of life, liberty, or property without due process of law"; and Art. 23 of the Bill of Rights of The Constitution of Maryland which similarly states. "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land".

In addition, there is involved the rule of *Hadley v. Baxendale*, 1854, 9 Exch., 341 (Eng.) dealing with damages in a breach of contract action, which case has been universally adopted and forms the Law of the land.

STATEMENT

St. Paul at Chase Corporation (St. Paul) was the owner and developer of a 22-story apartment building. Manufacturers Life Insurance Company of Toronto (Manufacturers), as a proposed long term mortgagee, after careful analysis of the project and its costs, placed a value of $7,920,000 on the building and land when completed, and an economic value on the project of $7,265,000. These values were furnished to St. Paul in a writing by Manufacturers' agent and were accepted by St. Paul. Based on these agreed upon values carefully determined by Manufacturers, Manufacturers contracted to give St. Paul a $4,800,000 mortgage (66% of Manufacturers' economic value of the project), repayable over 26 years at 6¼%. Chemical Bank New York Trust Company (Chemical) in reliance on Manufacturers' values, agreed to lend St. Paul $4.8 million with which to construct the building and entered into a buy-sell agreement with Manufacturers, under which Manufacturers agreed to buy and Chemical to sell, St. Paul's note and deed of trust, on completion of construction. St. Paul, in reliance upon the values Manufacturers placed on the building and land and the use of it, assumed enormous financial obligations to the construction lender and others and invested substantial additional monies in the project. On March 7, 1966, the scheduled day for consummation of Manufacturers' agreement, Manufacturers refused to go forward (A15a). As a result, the construction lender, Chemical foreclosed, acquired the building and obtain a $1.3 million deficiency decree against

St. Paul. The trial court and the Maryland Court of Appeals found that Manufacturers wrongfully breached its contract with St. Paul and with Chemical, and that this breach resulted in the loss of St. Paul's building and project (A38a).

In determining St. Paul's damages for having been wrongfully deprived of its building, the court below, the Court of Appeals of Maryland, totally contrary to the celebrated case of *Hadley v. Baxendale,* 1854, 9 Exch. 341 (Eng.) which has been applied in nearly every jurisdiction in the United States, but not in the context of the national mortgage lending industry, held that St. Paul was only entitled to whatever its equity was in the building on the date of breach, March 7, 1966 (A47a). In determining St. Paul's equity, the trial court and the Court below relied upon the testimony of the Defendants' hired appraisers who determined what they believed the "fair market value" for the building was under economic conditions and circumstances existing in Baltimore, Maryland, on the date of the breach. The trial court placed a "fair market value" of about $4.5 million on the building and concluded that since a $4.8 million mortgage was proposed, St. Paul had no equity and therefore lost nothing by having lost its building and project. The court below upheld this opinion of the trial court and merely awarded St. Paul monies that St. Paul owed to only certain of its creditors including Chemical. This award amounted to approximately $2,250,000. Nothing was allowed to St. Paul for the loss of its building and land, for the loss of the use of it, or for the enormous amount of time, effort, and monies invested in the project by St. Paul.

In finding that the 238 room, 22-story apartment building was valueless on the date of the breach, the Court below ignored the value of the building and land, and its

use, that had been established by Manufacturers and that formed the essence of the contract between St. Paul and Manufacturers, and instead placed a new value, determined under different economic conditions and circumstances which were not foreseeable nor contemplated at the time of contracting.

REASONS FOR GRANTING WRIT

1. THE DECISION OF THE COURT BELOW WILL CREATE CHAOS IN THE NATIONAL MORTGAGE INDUSTRY AND WILL ADVERSELY AFFECT THE FLOW OF MONEY INTO THE CONSTRUCTION INDUSTRY.

The decision of the court below, holding that damages in a breach of contract action are to be determined as of the date of the breach, invokes a Federal issue of paramount national importance. It directly and adversely affects the entire development and mortgage industry of the country. Today, with the emphasis on new construction, especially construction of large housing developments, considered by the Federal Government to be essential to national recovery, and for adequate housing for all of the people of the country, the sanctity of a mortgage commitment must be protected. All large developments are financed by a construction loan made against a long term mortgage commitment. In all financing of this type it is provided that the long term mortgagee under a buy-sell agreement with the construction lender, purchase the mortgage or deed of trust securing the construction loan, on completion of construction, provided only the project be built to the plans and specifications approved by the long term mortgagee and that the project be completed within the commitment period. If a long term mortgagee may take a second look at its commitment after a developer and construction lender has spent huge sums in reliance on it, and may then cancel its commitment as

was done in the instant case, then no developer or construction lender can in the future embark with any safety on the construction programs so necessary to the country. Should they elect to take this risk then it can be anticipated that their prices will reflect the risk, thereby further adding to present spiralling construction and development costs.

A long term mortgage cannot be accepted if it is made dependent on market fluctuations, or on conditions that might prevail at the time of completion of construction, some time in the future, which might be different from those at the time the contract was entered into. Once given, accepted, and relied upon, the commitment of a long term mortgagee must be held secure. If it is cancelled at the last minute and the mortgagor is unable to refinance and loses everything, the breaching mortgagee must be made to pay as damages the values that he had placed on the project when the developer accepted the commitment and proceeded to spend vast sums in reliance on its contract and those values. Only in this way can the injured mortgagor be made whole. Only in this way can a mortgagee be deterred from breaching his contract whenever he feels it to his advantage to do so.

Today, with the tremendous construction contracts that will be forthcoming if the Government's plans are met, it is essential that this Court reverse the ruling of the court below. Otherwise that opinion would be used to justify similar action on the part of other mortgagees, who, like Manufacturers, might find it advantageous to them to cancel their commitment and breach their contracts after a developer had completed the project. This would bring chaos to the development and mortgage industry.

2. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE RULE OF *HADLEY v. BAXENDALE*, 1854, 9 Exch. 341 (Eng.) WHICH CASE HAS BEEN UNIVERSALLY ADOPTED AND FORMS THE LAW OF THE LAND.

The court below recognized *Hadley* (A43a), but then rendered it meaningless. The ruling of that case was laid down by Baron Alderson to protect both parties to a contract, to establish the exposure and liability of the breaching party, and the rights of the injured party. Under that rule the liability of the breaching party would be limited to the values of the contract agreed upon even though at date of breach, the values might be higher. The injured party could not demand damages greater than the values that had been agreed upon. For the same reason, should there be a market recession at the time of the breach the injured party is entitled as damages to the values that were in the contemplation of the parties at the time the contract was made, i.e., to those values which formed the basis of the contract, should the contract be breached.

In clear and unequivocal terms Baron Alderson stated:

> ". . . where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be, either such as may fairly and substantially be considered as arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it . . ."

That the meaning of the word "damages" when used in plural form, as used by Baron Alderson, is still the meaning of that word today and does not refer to the elements making up the damage, but means the amount of

monies to be awarded, is shown in Black's Law Dictionary (4th Edition). There damages (in the plural) is defined as:

> "A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another". (Citations omitted).

On the other hand, Black's Law Dictionary (4th Edition), defines damage (in singular form) as:

> "Loss, injury, or deterioration caused by the negligence, design, or accident of one person to another in respect of the latter's person or property. The word is to be distinguished from its plural — 'damages' — which means a compensation in money for a loss or damage". (Citations omitted).

In many cases it could be difficult for a jury to determine what "damages" were in the contemplation of the parties at the time they entered into their contract, what values they had assigned to the contract at that time. In the subject case there is no difficulty. The parties had agreed to the values of the building and land, and of its use (A43a). These values had been reduced to a writing and had been furnished to St. Paul and were part of the evidence of the case. Likewise, in cases of partial loss it might be difficult for a jury to determine the amount of the loss. In the subject case the loss was not partial, it was complete.

The court below divorced the subject of the contract, St. Paul's building, from the value of the building. It held that the parties contemplated that should the contract be breached, St. Paul would lose its building, but ignored the value of the building and land and the use of it that had been agreed upon. The building and land, and its

use, cannot be separated from its value. One cannot be considered without the other, when the building and land, and its use, forms the security of a mortgage. The court below not only ignored these values, but referred to them in its opinion as "tentative" values (A47a). It would be difficult indeed, to imagine an insurance company giving a $4,800,000 mortgage commitment on "tentative" values, or giving a commitment subject to the appraised value of the property as of the date of completion, unless that insurance company from the beginning had its fingers crossed and fraudulently intended to cancel its commitment after the developer spent vast sums in reliance on it, should it then feel it was to its advantage to do so.

In the context of the construction and mortgage industry so vital to the well being of the country, a rule of a State Court cannot be allowed to negate the established rule of *Hadley v. Baxendale, supra,* as to the measure of damages in a breach of contract action which would adversely affect the economy of the country due to reliance other mortgages would place on the decision. The rule of the court below not only negates the rules of Hadley, but also negates established rules that hold that a court cannot change the terms or values inherent in a contract. To allow the decision of the court below to stand would destroy those rules of contract and breach of contract that have stood the test of time for over 100 years and that today forms the law of our country.

3. AN ARBITRARY "FAIR MARKET VALUE" AS A MEASURE OF DAMAGES IN A BREACH OF CONTRACT ACTION IS A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

A "fair market value" as of the date of the breach cannot be used in a breach of contract action to determine the damages to which the injured party is entitled, especially when

the parties to the contract had carefully determined the value of the property prior to entering into their contract. A "fair market value" as of the date of the taking is appropriate in condemnation cases. A "fair market value" as of the date of the wrong is appropriate in tort actions. A "fair market value" as of the date of the trial is appropriate in actions of "trover". A "fair market value" as of the date of a breach cannot be the determining factor in breach of contract actions, unless the contract so provided, for the simple reason that the parties had not so contracted. The determining factor must be the values that had been agreed upon at the time the contract was entered into, and which formed the basis of the contract. The transitory values at the date of the breach might be greater or less than values that formed the basis of the contract.

To arbitrarily hold that a mortgagor injured by a breach of contract must accept a "fair market value" for his property as of the date of the breach amounts to a taking of his property without due process of law, contrary to the provisions of the 14th Amendment of the Constitution of the United States and of Art. 23 of the Bill of Rights of the Constitution of Maryland, and cannot be sanctioned or tolerated. There is no Maryland statute and no Federal statute giving a court a right to force an injured party to accept a "fair market value" for his property as a measure of damages in a breach of contract action.

Your Petitioner unsuccessfully raised this issue in its Brief, during the trial below and in the Motions for Rehearing (A65a). This point was not answered by the court below. This Court is therefore respectfully requested to review the decision of the court below as to this vital issue.

Not only is the right of a court to set an arbitrary "fair market value" as of the date of the breach as a standard

to be used in determining damages in a breach of contract action an important Constitutional question, but the ruling of the court below as to this is of utmost importance to the mortgage industry and hence to the country at large.

Under the ruling of the court below, a mortgagee desiring to cancel a mortgage commitment or to cancel a mortgage could select a time when it is most advantageous to him and most disastrous to the mortgagor. If the mortgagee selected a time to breach his contract when there was a depression or even a temporary market recession, as was done in the subject case, he could bring in appraisers to show that the property at that particular time, under adverse economic conditions, was not worth the amount of the mortgage. The mortgagee could then cancel its contract with impunity, and with no redress to the injured mortgagor. During such periods it would be difficult and in many cases impossible for the mortgagor to arrange refinancing, as in the subject case. With a depression or recession, interest rates would increase. The mortgagee could then use his money to greater advantage elsewhere, leaving the mortgagor destitute, as was the case of St. Paul. During such a period the mortgagee could foreclose and buy in the mortgaged property at a price less than the amount of the mortgage. From the income of the property it could then gain a higher return than from the interest on the mortgage, and at the end of the depression or recession sell the property at a capital gain. Having bought in the property for less than the amount of the mortgage the mortgagee then could obtain a deficiency decree against the mortgagor, and should the mortgagor ever get back on his feet obtain an additional profit. The above is not fanciful for it is exactly what did happen in the subject case, except it was the construction loan mortgagee who foreclosed as a result of Manu-

facturers' breach, bought in the property for less than the mortgage, reportedly sold it at a profit, and obtained a deficiency decree.

The ruling of the court below, if allowed to stand, would destroy the sanctity of mortgage contracts. It would open wide the doors to all manner of fraudulent practices. It would adversely affect the development and mortgage industry, and it would adversely effect the economic recovery of the country.

4. THE EQUITIES

The equities alone of this case would demand that St. Paul be awarded full compensatory damages. As brought out at the trial, three years were spent in the preparation of plans and in acquiring options on the needed land. Another three years were spent in arranging financing and in constructing the building, in furnishing model apartments, in advertising and having the building ready and open for occupancy. An enormous amount of time, effort, and money was invested in the project. These expenses were included in the value of the completed building by Manufacturers and by St. Paul and are part of the damages demanded by St. Paul. St. Paul met all of its obligations. Knowing that St. Paul had placed their full confidence in them and were relying on them, knowing full well what the end result would be (A46a), that St. Paul would lose everything, Manufacturers for its own selfish reasons callously and wantonly cancelled its commitment and breached its contracts. There was a temporary highrise market recession in Baltimore. The shadow of spiraling interest rates was commencing to fall across the land. Manufacturers could use its money to better advantage elsewhere. In the words of the trial court in

its Findings of Facts and Conclusions of Law issued at the end of the hearing on liability:

> "I am persuaded beyond any doubt that the reason for the cancellation of this contract was, first, a calculated risk taken by Manufacturers that if it didn't accept the roll over, and if the construction mortgage were foreclosed, and if Manufacturers were sued, that it could weather the storm, either by avoiding liability completely, or if subjected to liability, by minimizing damages. They took that calculated risk, and they're stuck with the result". (A37a).

However, the trial court and the court below then awarded no damages to St. Paul for the loss of its building and land, for the loss of its use, or for the enormous amount of time, effort, and monies expended. Except for having to pay certain consequential damages, Manufacturers' "calculated risk" has so far paid off.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

W. HAMILTON WHITEFORD,
Counsel for Petitioner.

Of Counsel
DAVID FREISHTAT

LIBRARY
SUPREME COURT, U. S.
Supreme Court
FILED
AUG 31 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

~~No. 167~~ 71-167

ST. PAUL AT CHASE CORPORATION,
A MARYLAND CORPORATION,
Petitioner,

v.

MANUFACTURERS LIFE INSURANCE COMPANY OF TORONTO, A CANADIAN CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT IN OPPOSITION

RICHARD W. CASE,
1700 One Charles Center,
Baltimore, Maryland 21201,
Counsel for Respondent.

The Daily Record Co., Baltimore, Md. 21203

Table of Contents

	Page
Jurisdiction	1
Statute Involved	2
Statement	2
Argument:	
I. There Is No Federal Question Present In The Record Of This Case	3
II. Petitioner's Attempt To Raise A Federal Question Was Not Timely	4
III. Measuring Damages By Fair Market Value At Time Of Breach Is Not A Taking Of Property Without Due Process Of Law	5
Conclusion	6

Table of Citations

Cases

American Railway Express Co. v. Kentucky, 273 U.S. 269 (1927)	4
Black v. Cutter Laboratories, 351 U.S. 292 (1956)	4
Bowe v. Scott, 233 U.S. 658 (1914)	5
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930)	4
Hadley v. Baxendale, 9 Exch. 341 (1854)	4
Hanson v. Denckla, 357 U.S. 235 (1958)	5
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945)	5
Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653 (1953)	4
United States v. Miller, 317 U.S. 369 (1943)	6
United States v. Virginia Electric & Power Co., 365 U.S. 624 (1961)	6
United States ex rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266 (1943)	6

Statutes

28 U.S.C. § 1254	1
28 U.S.C. § 1257(3)	1, 2, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 167

ST. PAUL AT CHASE CORPORATION,
A MARYLAND CORPORATION,
Petitioner,

v.

MANUFACTURERS LIFE INSURANCE COMPANY OF TORONTO, A CANADIAN CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

Petitioner has erroneously sought review by this Court pursuant to 28 U.S.C. § 1254. Section 1254 confers on this Court only the power to review decisions of the United States courts of appeals. Respondent's argument will assume, but not encourage, that this Court will consider the Petition to have been an attempt to invoke jurisdiction under 28 U.S.C. § 1257(3).

STATUTE INVOLVED

United States Code, Title 28:

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * * *

(3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT

Manufacturers Life Insurance Company (Manufacturers), on June 7, 1963, issued a commitment for permanent mortgage financing of a high-rise apartment building to be constructed in Baltimore, Maryland, by St. Paul at Chase Corporation (St. Paul). On March 7, 1966, the expiry date of that commitment, Manufacturers, having been advised that the conditions of its commitment contract had not been fulfilled by St. Paul, elected to exercise its option to cancel the contract.

Thereafter, St. Paul brought suit against Manufacturers alleging, among other things, breach of contract. The Maryland Court of Appeals ultimately ruled[1] that Manufacturers

---

[1] The case was first filed in the Superior Court for Baltimore City and thereafter removed to the Circuit Court for Baltimore County where it was tried non-jury before Judge Kenneth C. Proctor. The trial took approximately five weeks of which the first four were concerned with the question of liability and the balance with the problem of damages. During the trial the parties introduced a total of 153 exhibits; the total trial transcript consists of 3,269 pages. Judge Proctor filed findings of fact and conclusions of law consisting of 151 pages and subsequently an opinion and judgment nisi of 42 pages. Petitioner appealed to the Court of Appeals of Maryland; Respondent cross-appealed. Six briefs were filed with the Court of Appeals, and

breached its contract, thus affirming the trial court's conclusion that St. Paul's substantial completion of the building met the conditions of the commitment contract. The trial court had awarded St. Paul over $1.5 million in damages against Manufacturers. The Maryland Court of Appeals concluded that St. Paul sustained additional consequential damages from Manufacturers' breach, resulting in a total award of approximately $2.25 million of which $2,015,035.14 was awarded against Manufacturers.

St. Paul, not satisfied with the Maryland Court of Appeals' interpretation of the Maryland law of damages consequent to breach of contract, has petitioned this Court, apparently in the belief that this Court will construe Maryland law in a manner which will enlarge St. Paul's award.

ARGUMENT

I.

THERE IS NO FEDERAL QUESTION PRESENT IN THE RECORD OF THIS CASE.

The thrust of Petitioner's argument is that the Maryland Court of Appeals applied an improper standard for computing damages which flowed from the breach of a contract made and to be performed in Maryland. That the measure of damages consequent to breach of contract is purely a matter of state and not Federal law has been made manifestly clear by this Court.[2] There is "no question but that the substantive law of [the state] should determine the

---

the time for the argument before that Court was more than twice that assigned in the usual case. These facts are cited to demonstrate that this case has been thoroughly and adequately presented to the Maryland courts.

[2] Indeed, were it not so clear that no Federal question arises from the Maryland Court of Appeals' ruling on damages, Respondent Manufacturers would have petitioned this Court for review of an award which places Petitioner in a far *better* financial position than Petitioner would have been in had Respondent fully performed.

requirements of the cause of action, the interpretation of the contract and the measure of damages to be applied." *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653, 656-57 (1953). *See Black v. Cutter Laboratories*, 351 U.S. 292, 299-300 (1956).

Petitioner incorrectly assumes that it has a right under the Federal Constitution to have the rule of *Hadley v. Baxendale*, 9 Exch. 341 (1854), applied in the manner it contends is proper to measure its damages. Justice McReynolds, speaking for this Court in *American Railway Express Co. v. Kentucky*, 273 U.S. 269 (1927), said at 272: "[W]e must accept as controlling the decision of the state courts upon questions of local law, both statutory and common." Even if the Maryland Court of Appeals' application of *Hadley v. Baxendale* were against the weight of authority, Petitioner would have no Constitutional complaint. "It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law." 273 U.S. at 273.

Nor has Petitioner raised a Federal question by asserting that its rights under the Maryland Constitution have been infringed. Interpretation of a state constitution is solely a matter of state law. *See Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930).

II.

PETITIONER'S ATTEMPT TO RAISE A FEDERAL QUESTION WAS NOT TIMELY.

Assuming *arguendo* that Petitioner has raised a Federal question, it has not been "specially set up or claimed" [28 U.S.C. § 1257(3)] in timely fashion. Petitioner's suit against Respondent was initiated in 1966. Only after five

years of protracted litigation, after the Maryland Court of Appeals affirmed the trial court's award in Petitioner's favor, did Petitioner make fleeting reference to the Fourteenth Amendment in its Motion for Modification of Decision and for Rehearing (see p. 65a of Appendix to Petition). And in its subsequent Supplemental Motion for Modification of Decision and for Rehearing, Petitioner made no reference to the Constitution (see pp. 67a-80a of Appendix to Petition). Both motions were denied by the Maryland Court of Appeals without discussion.

> [I]t is elementary that a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking the jurisdiction of this court unless the court below, in dealing with the petition for rehearing, considers and passes upon the Federal ground therein relied upon. . . .

Bowe v. Scott, 233 U.S. 658, 663 (1914). *See Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945).

III.

MEASURING DAMAGES BY FAIR MARKET VALUE AT TIME OF BREACH IS NOT A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Petitioner claims that it was deprived of property without due process of law because it was awarded damages based only on the actual fair market value of the building at time of breach. Petitioner urges this Court to hold that its Constitutional measure of damages should be based on a speculative value placed on the building three years prior to its construction.

Petitioner's attack on the "fair market value" standard of measuring damages is unfounded, for this Court has on

numerous occasions approved the use of that formula in a Constitutional context. *See, e.g., United States v. Virginia Electric & Power Co.*, 365 U.S. 624 (1961); *United States* ex rel. *Tennessee Valley Authority v. Powelson*, 319 U.S. 266 (1943); *United States v. Miller*, 317 U.S. 369 (1943).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD W. CASE,
Counsel for Respondent.

LIBRARY
SUPREME COURT, U. S.

71 - 167

Supreme Court, U.S.
FILED
SEP 13 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 167

ST. PAUL AT CHASE CORPORATION,
A MARYLAND CORPORATION,
Petitioner,

v.

MANUFACTURERS LIFE INSURANCE COMPANY
OF TORONTO,
A CANADIAN CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

PETITIONER'S REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

W. HAMILTON WHITEFORD,
Sun Life Building,
Baltimore, Md. 21202,
Counsel for Petitioner.

Of Counsel:
DAVID FREISHTAT,
Tower Building,
Baltimore, Md. 21202

The Daily Record Co., Baltimore, Md. 21203

Table of Contents

	PAGE
Introduction	1
Petitioner's Answers to Issues Raised by Respondent:	
As to Jurisdiction	2
As to Respondent's Statement	2
As to Respondent's Arguments:	
I. There is no Federal Question Present	4
II. Petitioner's Attempt to Raise a Federal Question is not timely	5
III. Measuring Damages by Fair Market Value at time of breach is not a taking of property without due process of law	8
Conclusion	9

Table of Citations

Cases

Abbott v. Gatch, 1859, 13 Md. 314, 71 ~~A. 2d~~ AD 635	5
Easter v. Dundalk Holding Co., 1952, 199 Md. 303, 86 A. 2d 404	6, 7
Hadley v. Baxendale, 1854, 9 Exch. 341 (Eng.)	3, 4, 5
Lichtenberg v. Sachs, 1957, 213 Md. 147, 131 A. 2d 264	6, 7
Reichter cert v. General Insurance Co. (Calif.) 1967, 428 P. 2d 860, vac. on other grounds, 1968, 442 P. 2d 377	3
United States v. Miller, 1943, 317 U.S. 369	9
United States ex rel. Tennessee Valley Authority v. Powelson, 1943, 319 U.S. 266	9
United States v. Virginia Electric Power Co., 365, U.S. 624, 1962	9

Statutes

28 U.S.C. Sec. 1257	2
Annotated Code of Maryland, Eminent Domain:	
Art. 33A—	
Sec. 6	6, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 167

ST. PAUL AT CHASE CORPORATION,
A MARYLAND CORPORATION,
Petitioner,

v.

MANUFACTURERS LIFE INSURANCE COMPANY
OF TORONTO,
A CANADIAN CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

PETITIONER'S REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

INTRODUCTION

On August 4, 1971, St. Paul at Chase Corporation (St. Paul), filed a Petition for a Writ of Certiorari to the Court of Appeals of Maryland.

On August 31, 1971, Manufacturers Life Insurance Company of Toronto (Manufacturers) filed a Brief for Respondent in Opposition.

ST. PAUL'S ANSWERS TO THE ISSUES RAISED BY MANUFACTURERS

Jurisdiction

Here Respondent was correct. Inadvertently Petitioner cited 28 U.S.C. Sec. 1254, instead of the correct Sec. 1257. This obvious error has been corrected by interlineation.

Statement

Respondent stated:

> "St. Paul, not satisfied with the Maryland Court of Appeals' interpretation of the Maryland Law of damages consequent to breach of contract, has petitioned this Court, apparently in the belief that this Court will construe Maryland Law in a manner which will enlarge St. Paul's award."

By a footnote, Respondent stated that under the awards of consequential damages made by the court below, Petitioner was actually placed "in a far better financial position than Petitioner would have been in had Respondent fully performed."

Your Petitioner takes exception to both of the above statements as not being conducive to the facts.

Petitioner has not requested this Court to construe Maryland Law. Petitioner has contended that the opinion of the court below relative to the measure of damages in a breach of contract action was in error and was contrary to established General Law, and that it is a proper one for review of this Court under Rule 19 of the Rules of the Supreme Court of the United States (adopted June 15, 1970, effective July 1, 1970) which reads as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important

reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Your Petitioner respectfully submits that the question raised by them involves a Federal question of substance and of national importance which has not been previously determined by this Court and which should be settled by this Court. Your Petitioner further submits that not only is the opinion of the court below in direct conflict with established General Law stemming from *Hadley v. Baxendale*, 1854, 9 Exch. 341 (Eng.), but is in direct conflict with the rule laid down by the Supreme Court of California in *Reichert v. General Insurance Co.*, 1967, 428 P. 2d 860 vac. on other grounds, 1968, 442 P. 2d 377. In that case the Fire Insurance Co. (General) refused to make payment for an insured loss, which loss forced the plaintiff into bank-

ruptcy. The court held that the company under its policy would have been liable only for the amount of the fire loss, but having ~~reached~~ breached its ~~east~~ contract it was liable for the full value of the property at the time the contract was made, which was considerably more than the amount of the loss.

It can hardly be seriously contended that your Petitioner was placed "in a far better financial position than Petitioner would have been in had Respondent fully performed". By the opinion of the court below, St. Paul was only awarded monies to enable it to pay certain creditors. As noted in the opinion, the award did not even cover all creditors. Furthermore, not one cent was awarded to St. Paul to compensate it for the loss of its 22 story, 238 unit apartment building, wrongfully caused, as found and held by the court below, by Manufacturers' breach of contract, which building at the time the contract was made was valued by Manufacturers at $7,920,000. This was the value of the contract that was in the contemplation of the parties at the time the contract was made.

PETITIONER'S ANSWERS TO RESPONDENT'S ARGUMENTS

I. Respondent contended there is no Federal question present in the record of the case. That there is a Federal question is readily apparent. The Court is not requested to review a decision dealing with local (state) substitutive law. The law the Court is requested to review is the law dealing with breach of contract laid down in *Hadley v. Baxendale, supra,* which has been adopted by nearly all of the states of the country and by all text writers as being the very foundation of all cases dealing with breach of contract. A ruling by a state court that completely contravenes the rule of *Hadley v. Baxendale, supra,* and renders it meaning-

less, is a ruling of Federal and national importance, a review of which is provided for under Rule 19 of the Rules of the Supreme Court of the United States given above. If such a ruling is not reviewed and reversed by this Court, it could throw the entire mortgage industry of the country into utter chaos. Under the ruling of the court below, in times of escalating interest rates and in times of a depression, or even temporary market recession, any mortgagee could breach its mortgage commitment with impunity. Such a ruling if allowed to stand would seriously and adversely affect the flow of capital into the construction and development industry so vital to the economy of the country.

II. Respondent's statement that Petitioner's attempt to raise a Federal question was not timely and that Petitioner after five years of protracted litigation only made fleeting reference to the Fourteenth Amendment in its Motion for Modification of Decision and for Rehearing, again is a statement that is not conducive to the facts.

Following the oral arguments made during the trial of the case, the trial court requested all parties to submit written memoranda of law to support their arguments, prior to rendering its decision. In their memoranda of law Petitioner stated:

> "Likewise, the Defendants cannot contend that to put the Plaintiff back in the position he would have been, the Defendants have only to pay a 'fair market value' of the property at the time of their breach. Such a measure of damages is contrary to the rules of *Hadley v. Baxendale, supra,* and *Abbott v. Gatch, supra,* and is not allowable as not having been within the contemplation of the parties. Whether this so-called 'fair market value' would be higher or lower than that contemplated would be immaterial. The governing factor under Maryland Law is the value that was contemplated.

A so-called 'fair market value' is provided for in condemnation cases, *Eminent Domain*, Art. 33A, Sec. 6 of the *Annotated Code of Maryland*, 1957, with Supplements. However, only the state or its duly authorized agencies may acquire private property against the will of the landowner and only the state can force a person to accept a so-called 'fair market value' for his land. That this right and the so-called 'fair market value' rule as a meaure of damages does not extend to private individuals is clearly shown in *Lichtenberg v. Sachs*, 1957, 213 Md. 147 at 152 and in *Easter v. Dundalk Holding Co.*, 1952, 199 Md. 303 at 307. In the *Easter* case, the plaintiff who had knowingly and willfully encroached on his neighbor's property, applied to the court for an order allowing him to pay the defendant a fair market value for the property taken. In the *Lichtenberg* case, the plaintiff who had knowingly and willfully blocked the defendant's right-of-way, applied for an order requiring the defendant to accept another right-of-way. In both cases, the court held that even a court of equity cannot require a landowner who was an innocent party to accept a fair market value for the wrongful taking of his property, stating:

> 'For a taking of one's property for the private use of another even with just compensation, is a deprivation of property without due process of law in violation of Art. 23 of the Maryland Declaration of Rights and of the Fourteenth Amendment of the Constitution of the United States'.

Whether a defendant wrongfully took another's property for his own use, or wrongfully caused another to lose his property, is immaterial. Under the rule of contract and of tort, one who has caused a loss of another's property is liable for all losses consequent to his wrongdoing and cannot merely offer a restitution on the basis of a supposed 'fair market value' at the time of the wrong. Certainly the wrongdoer cannot be allowed to hire appraisers to establish a so-called 'fair market value' so as to acquire another's

property who is not willing to sell, or so as to establish the damages for his wrongdoing. Such would open wide the doors to all manner of fraudulent actions, which doors had been firmly closed in the *Lichtenberg* and *Easter* cases."

Respondent having submitted its memoranda of law, Petitioner in its Reply Memoranda of Law again stated:

"The Defendants cannot now attempt to avoid or minimize the damages which they caused the Plaintiff and with which they are faced, by using this foreclosure 'sale' price as a yardstick of the value of the Plaintiff's property. This 'sale' was wrongfully caused by the Defendants. Nor can the Defendants, who had wrongfully caused the loss of the Plaintiff's property, attempt by their expert witnesses, to set a so-called 'fair market value' on the Plaintiffs' property, so as to minimize or avoid their liability. In *Easter v. Dundalk Holding Co.*, 1952, 199 Md. 303, and in *Lichtenberg v. Sachs*, 1957, 213 Md. 137, the plaintiffs had wrongfully and knowingly encroached on the defendants properties, and had erected buildings on them. Having done so the plaintiffs went into an Equity Court and attempted to force the plaintiffs to accept a 'fair market value' in one case and in the other to accept another right-of-way. The Court in each case held that even a Court of Equity cannot require a landowner who was an innocent party to accept a 'fair market value' for the wrongful taking of his property. Whether a defendant wrongfully took another's property, or as in the subject case, wrongfully caused another to lose his property, is immaterial".

In their Brief submitted to the Court of Appeals of Maryland, your Petitioners again raised the same constitutional question where they stated:

"In *Lichtenberg v. Sachs*, 1957, 213 Md. 147, 152, and in *Easter v. Dundalk Holding Co.*, 1952, 199 Md. 303, 307, the Court held that neither a wrongdoer nor an Equity Court can force an injured party to accept a

> "fair market value' for his property 'as such would be a deprivation of property without due process of law in violation of Art. 23 of the Maryland Declaration of Rights, and of the Fourteenth Amendment of the Constitution of the United States'. Whether a person wrongfully took another's property or wrongfully caused another to lose his property is immaterial. The wrongdoer cannot force the injured party to accept an arbitrarily established 'fair market value' for his property.
>
> "In addition, only the State or its duly authorized agencies under the *Right of Eminent Domain, Maryland Annotated Code,* 1957, as amended, Article 33A, Sec. 6, may force a landowner to accept a 'fair market value' for his property."

As admitted by Respondent, this question was again raised by Petitioner in its Motion for Modification of Decision and for Rehearing.

III. Here Respondent stated that measuring damages by "fair market value" at time of breach is not a taking of property without due process of law. To support their statement Respondent gave two arguments.

The first was that the Petitioner had urged the Court, "to hold its Constitutional measure of damages should be based on a speculative value placed on the building three years prior to its construction". Petitioner submits that the value placed on the property by Manufacturers at the time the contract was made, $7,920,000, was not a speculative value. Whether this value was too high or too low is immaterial. It was this value that formed the basis of the contract between St. Paul and Manufacturers. It was based on their valuation of $7,920,000, that Manufacturers made a 66% mortgage commitment of $4,800,000. It is submitted that no insurance company such as Respondent could or would make a commitment of this size based on a specula-

tive value or on a value to be determined on date of completion unless as stated by Petitioner in their ~~Petition~~ Brief, Manufacturers was secretly and fraudulently intending to breach their contract after Petitioner had spent millions of dollars, should in the opinion of Manufacturers it be to their advantage to do so.

Respondent's second argument was that, "Petitioner's attack on the 'fair market value' standard of measuring damages is unfounded, for this Court has on numerous occasions approved the use of that formula in a Constitutional context". To support their statement, Respondent cited *United States v. Virginia Electric Power Co.*, 365 U.S. 624 (1962); *United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U.S. 266 (1943); *United States v. Miller*, 317 U.S. 369 (1943).

Not one of the above cases cited by the Respondent dealt with breach of contract. They all dealt with condemnation and damages to be awarded under condemnation. A "fair market value" at date of taking is the accepted standard for establishing an award in condemnation cases. These cases cited by Respondent merely emphasize that there is a different rule followed in establishing an award in condemnation cases from the rule establishing damages in breach of contract actions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

W. HAMILTON WHITEFORD,
Counsel for Petitioner.

Of Counsel:
DAVID FREISHTAT